

TRIALS
FOR
High-Treason,
AND
OTHER CRIMES.
WITH
PROCEEDINGS
ON
Bills of Attainder,
AND
IMPEACHMENTS.

For Three Hundred Years Past.

To which are prefix'd,

A PREFACE, giving an Account
of the Nature and Usefulness of the WORK.

AND

An ALPHABETICAL TABLE of
the respective PERSONS Try'd, and the
Points of Law Debated and Adjudg'd.

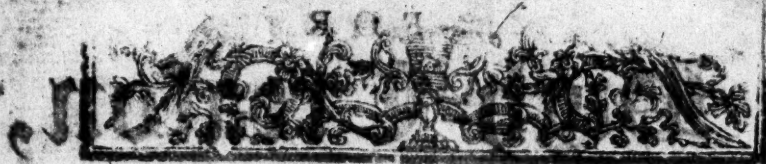
By the SAME HAND that prepared the Folio
Edition for the PRESS,

PART VI.

L O N D O N :

Printed for D. Browne, G. Strahan, W. Mears, R. Gosling,
and F. Clay. MDCCXX.

TRYAL



OTHER CRIMES.

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Bills of Attainder,

STRENGTHENED

of the Nature and Objects of the Work.

An ALPHABETICAL TABLE of the respective Persons, and the Points of Law Debated and Adjudged.

Editorial for the Record

Printed for D. Brown, G. B. Smith, W. H. Smith, and J. H. Smith.
LONDON.
PART VI.



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Contain'd in

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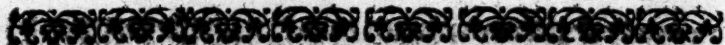
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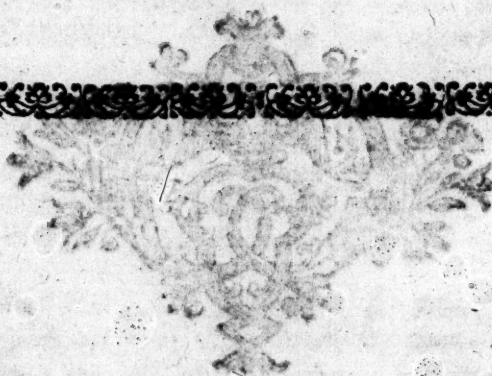
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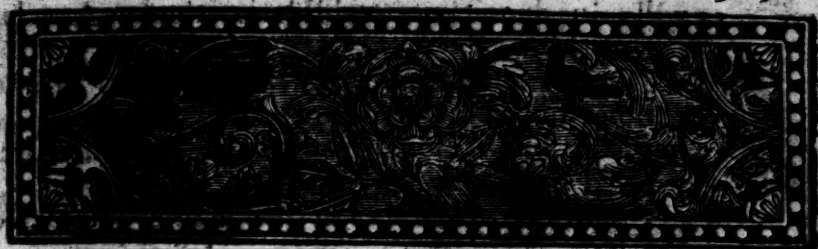
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STATE TRYALS.

The Proceedings of the House of Peers, in Relation to the Lords Impeach'd or Charg'd the 13 W. 3. Vol. IV. Page 513.

Anno Dom. 1701. viz. WILLIAM Earl of PORTLAND, JOHN Lord SOMMERS, EDWARD Earl of ORFORD, and CHARLES Lord HALLIFAX; as also JOHN Lord HAVERSHAM.

Die Martis 1 Aprilis 1701.



MESSAGE was brought from The 4 Lords the House of Commons by Sir Impeach'd. John Levison Gomer, and others, who at the Bar of this House, in the Name of the House of Commons, and all the Commons of England, Impeached William Earl of Portland, of High Crimes and Misdemeanors, and acquainted this House, that the House of Commons will,

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The PROCEEDINGS against

will, in due Time, exhibit particular Articles against him.

Die Martis 15 Apr. 1701. Mr. *Harcourt* in like manner Impeach'd the Lord *Sommers*.

Eodem die, Colonel *Bierly* in like manner Impeach'd the Earl of *Orford*.

Eodem die, Mr. *Bruges* in like manner Impeach'd the Lord *Hallifax*.

The Lords address His Majesty in their Behalf.

Die Mercurii 16 Apr. The House of Peers resolv'd upon an Address to His Majesty, That he wou'd be pleas'd not to pass any Censure on the Impeach'd Lords, until they shou'd be tried on the said Impeachments, and Judgment given, according to the Usage of Parliament, and the Laws of the Land.

The Commons reminded to exhibit Articles.

Die June 5 Maij. A Message was sent to the Commons, to put them in mind, That as yet no Articles were exhibited against the Impeach'd Lords; which after Impeachments have been so long depending, is due in Justice to the Persons concern'd, and agreeable to the Methods of Parliament in such Cases.

Articles against the Earl of *Orford*.

Die Veneris 9 Maij. Colonel *Byerly* brought up the Articles of Impeachment against *Edward* Earl of *Orford*, and acquainted this House, That the Matter of the Charge was contained in the Articles; and also, that he was commanded to pray and demand, That the Earl of *Orford* do give sufficient Security to abide the Judgment of the House of Lords.

No Security requir'd of the Impeach'd Lords.

The House adjourned during Pleasure, for a Committee to meet presently: And the Earl of *Stamford* reported, That the Committee had met and inspected the Journals; that they do not find any mention of the Commons reading the Articles at the Bar; and as for giving Security, they find none. Then the Articles were read by the Clerk.

Article 1.

That whereas the Nation has been long engaged in an expensive War with the French King, for preserving the Ballance of Europe; and that great Sums have been levied, and many

many Debts contracted towards the Prosecution of this War; the said Earl notwithstanding, preferring his private Interest to the Good of the Publick, and in Violation of the Trust reposed in him, hath procured of His Majesty a Grant of several Mannors, Lands and Tenements, of a great yearly Value, and also of exorbitant Sums of Money, whereby the standing Revenues of the Crown are greatly diminish'd, and the People of England burthen'd with Debts, and subjected to grievous Taxes.

The said Earl saving to himself all Advantages of Exception to the said Articles, &c. humbly saith,

To the first Article, That he having for several Years rendred His Majesty his utmost Service and Duty, he was pleas'd to make the said Earl two Grants; one was a Reversionary Grant, for Years of some Houses, depending upon a then precedent Estate, for about 29 Years; and the other, a Grant of a Remainder of a Gross Sum of about 2000 Pounds a Year, for five Years; which are the only Grants he hath had from His Majesty, and which he freely bestow'd upon him, without any Surprize or indirect Means of the said Earl, in obtaining the same, the accepting whereof he humbly hopes was not any Violation of this Duty, or of any Trust reposed in him.

That while the said Earl commanded the Navy in the *Streights*, he receiv'd great Sums for the Service of the Navy, which he converted to his private Use, and unjustly procur'd a Privy-Seal to discharge him from accounting for the same; and also receiv'd great Sums, as Pay-Master of the Navy, without giving Account thereof, whereby he hath occasion'd great Discontents among the Seamen and others, who are thereby reduc'd to great Misery, to the Discouragement of the publick Service.

The said Earl denies he converted any Money issued to him for the Service of the Navy to his private Use, or provided a Privy-Seal to discharge him from accounting for the same, but that he hath legally pass'd his Accounts upon Oath, and

Answer, pub
in 24 May,
1701.

Art. 2.

Answer. 2.

515. obtain'd his *Quietus est*. But that the Commissioners of the Victualling-Office making some Objections about some Provisions had and spent in *Spain*, by the Seamen, and paid for by the said Earl, which Objections had not been made in like Cases, His Majesty directed a Privy-Seal to dispense with the Form in that Particular, it appearing, on Examination, that less Rates were allow'd for the said Provisions, than had been allow'd in like Cases.

That as for Money receiv'd by him, as Pay-Master of the Navy; he hath already deliver'd in his Accounts, and is ready to perfect the same, and does not believe he shall appear to be indebted upon the said Accounts, and denies that any Persons have been Sufferers, &c.

Art. 3. That the said Earl receiv'd from the King of *Spain* great Sums of Money, and great Quantities of Provision for the Use of the Fleet while he was there, which he converted to his private Use, and that to secure himself from rendring an Account, he possess'd himself of divers great Offices, that are inconsistent, and ought to be a Check upon one another; in Breach of the Laws, &c.

Ans. 3. He denies he receiv'd any Money of the King of *Spain*, and says, The Provisions he receiv'd were distributed among the Seamen: Denies he enjoy'd any Offices that are inconsistent, or ought to be Checks upon one another; or pretended to secure himself from rendring an Account.

Art. 4. That he hath sold several Ships as Prizes, without Condemnation, and converted the Money to his own Use, part whereof (if they had been legally condemn'd) are appropriated to publick Uses; by which the publick has been defrauded, and the Debts of the Nation greatly encreas'd.

Ans. 4. Denies he sold any Ship, or the Lading, without Condemnation; but gave Orders that the Prizes taken shou'd be carefully preserv'd, without Imbezzlement, and the Product answer'd as the Law directs, and that the Publick hath not been endamag'd, or the Debts encreas'd by the said Earl.

That

That the *India* Company applying themselves Art. 5.
to the Lords of the Admiralty, whereof the said
Earl was one, for Letters of Marque to suppress
the Pirates in the *South* Seas; he discouraged their 516.
Request, and did procure a Commission for one
William Kidd, and likewise a Grant under the
Great Seal, to the Use of the said Earl, and o-
thers of the Ships and Goods of certain Persons
therein named; that the said Company being
apprehensive of the ill Consequences, apply'd
themselves to the Board of Admiralty, to know
what Powers were granted to *Kidd*. But their
Request was denied, and *Kidd*, who was known
to be a Person of ill Fame, ordered to pursue his
Voyage; in which he committed divers Piracies,
being thereto encouraged in hopes of being pro-
tected by the said Earl.

He admits the *India* Company, apply'd to the *Answ. 1.*
Admiralty, to impower them to take all Pirates
within the Limits of their Charter, and to erect
a Court of Admiralty in those Parts, to condemn
them: But that the Board of Admiralty were ad-
vised they had no Authority to grant the same,
and denies the Company were denied Letters of
Marque in common Form: He says *Kidd* was gone
upon his Expedition twelve Months before that
Time: And as to the Commission and Grant
mentioned, he conceives they were not contrary
to Law: And that *Kidd* had no other Powers or
Instructions than the ordinary Letters of Marque;
Denies he knew him to be of ill Fame; and if he
had committed any Piracies he was to answer for
them, but denies he had any Encouragement to
do any illegal Action from him.

That the said Earl, at a Time when a Conspira- *Art. 2.*
cy was discover'd against His Majesty, and the
Kingdom was apprehensive of an immediate In-
vasion, did his utmost Endeavour to weaken the
Navy Royal, and, without the Privity of the o-
ther Lords of the Admiralty, did order Captain
Steward, Commander of the *Dutchess*, to put on
Board Capt. *Kidd*, a great Number of able Sea-
men, provided at the publick Expence, against
their

The PROCEEDINGS against

their own Consent, to the Prejudice of the publick Security, and the endangering of the said Ship *Dutchess*, if she had been attack'd.

Ans. 6. He says, That the Men taken from on Board the *Dutchess*, were some of the very Persons just before taken from on Board Capt. *Kidd*, and return'd, by their own Consent, on Board Capt. *Kidd* again, when all Fears of the Invasion were over, and that they were not above twenty in Number, and therefore denies it was done with any Intent to weaken the Royal Navy, &c.

Art. 7. That the Earl, during the War, when Ships were wanting to guard the Seas, &c. procured a Grant of the Ship *Dolphin*, fitted out for publick Service, to be employed in a private Voyage, for the Advantage of himself and others, to the Encrease of the publick Debts, &c.

Ans. 7. He denies his procuring such Grant, but that it was obtain'd by other Persons, after the Peace was concluded, contrary to the Advice of the said Earl; nor was he concern'd in Point of Interest, till after His Majesty's Orders were given about the said Ship, but that afterwards, indeed, some Shares were made over to him.

517.

Art. 8. That the said Earl, in Contempt of Orders, had unnecessarily expos'd the Navy Royal to imminent Danger; and had at other Times suffer'd the Enemy's Ships to return safe into their Harbours, when he might have destroy'd them.

Ans. 8. He denies both the Charges in this Article, and insists he is not guilty of any Neglect, or Omission of his Duty herein; nor did expect to be Charg'd therewith, considering his faithful Services rendred against the *French* Fleet.

Art. 9. That he advis'd His Majesty to enter into several Treaties with the *French* King, in the Years 1698, and 1699, for dividing the Monarchy of *Spain*, whereby great Injustice was done the Emperor, an ancient Ally, and a great Prejudice to the Protestant Religion, and that the said Treaties were ruinous to Trade, dishonourable, &c.

Ans. 9. The said Earl denies he advis'd the Partition Treaty; but so far as he was acquainted there-

therewith, he gave his Opinion against the same.

That the said Earl was one of the Lords Justices Art. 10.
during the King's Absence, First Commissioner of
the Admiralty, One of the Privy-Council, and
Treasurer of the Navy, during the Time the
Crimes above set forth were committed: That the
Commons saving to themselves the Liberty of ex-
hibiting any other Accusations, &c. against the
said Earl, pray he may answer, &c.

The Earl acknowledges, he was entrusted with Answ. 10.
the several Offices herein enumerated; and says,
that he discharg'd them faithfully, &c. and does
humbly insist and answer to the said Impeach-
ment, That he is not Guilty, &c.

O R F O R D.

After reading the Articles, the Lords order'd
that the Earl shou'd have a Copy of them; and
sent a Message to the Commons, That they cou'd
find no Precedent of Security being given on an
Impeachment for High Crimes. 518.

Die Mercurij. 14 Maij. The Earl of Orford de-
liver'd in his Answer; and Mr. Dodd, and Mr. Council as-
Pooley were assign'd him for Council at his Trial, sign'd the E.
upon Request. of Orford.

Die Jovis 15 Maij. A Copy of the E. of Orford's
Answer was sent down to the Commons, with a
Message to remind them, that no particular Ar-
ticles were yet exhibited against the three other
Impeach'd Lords, which was due to them in Ju-
stice, &c.

The Messengers sent to the Commons, return'd
Answer, That the Articles were preparing.

Die Lune 19 Maij. Mr. Harcourt brought up the
Articles against John Lord Sommers, and pray'd Articles 1.
he might give Security, &c. And the Articles gainst the L.
were read by the Clerk. Sommers.

That a Treaty and Alliance between Leopold Article 1.
the Emperor of Germany, and the States General,
was concluded in the Year 1689. in which it was
stipulated, That during the War with France,
there

The PROCEEDINGS against

- there shou'd be a defensive and offensive Alliance between the said Parties, by vertue whereof they
519. shou'd both of them act with all their Forces against the *French King*; and that after the War shou'd be ended, there should remain a perpetual defensive Alliance between them, against the Crown of *France*, and that they shou'd at all Times, with all their Forces, protect and defend all the Rights of each other, against the Crown of *France*, and its Adherents: That by a separate Article it was agreed, That in Case His Catholick Majesty shou'd die without lawful Issue, the said States wou'd assist his said Imperial Majesty, and his Heirs, in taking Possession of the *Spanish Monarchy*, with the Dominions belonging to it, against the *French* and their Adherents, that in the said Year 1689, *England* did in the most solemn manner enter into the said Alliance, which was ratified under the Great Seal; That notwithstanding, in the Year 1698, the said Lord
520. *Sommers* advis'd His Majesty to enter into a Treaty with *France*, and the States General, for the Partition of the *Spanish Monarchy*; and did further agree, That if any Prince whatsoever shou'd oppose the taking Possession of the Shares thereby agreed on, His Majesty, the *French King*, and the States General, shou'd assist one another against such Opposition, and hinder the same with all their Power; And that this Treaty was ratified under the Great Seal of *England*, then in the Custody of the Lord *Sommers*, as an Agreement between His Majesty, the *French King*, and the States General, notwithstanding the said Lord *Sommers* well knew, that the same had been concluded between His Majesty's Commissioners, and the *French Ambassador* only, and that the Purport thereof had never been communicated to the States General at that Time.
- 521.

The Answer of *John Lord Sommers*, Baron of *Evesham*, put in the 24 May, 1701.

Ans^r. 1. To the first Article, he says, He admits there was such a Treaty in 1689, between the Emperor and the States General; and that His Majesty did enter

enter into and ratify the same: And saith further, That in the Year 1698, His Majesty, before he left *England*, did tell him some Intimation was given to the Earl of *Portland*, when in *France*,
 521.
 that the *French* King inclined to come to an Agreement with His Majesty, concerning the Succession to the Crown of *Spain*: That in *August*, 1698, Mr. Secretary *Vernon* communicated a Letter to him, written by the E. of *Portland*, from *Holland*, by His Majesty's Order, intimating, That Count *Tallard*, the *French* Ambassador, had declared that an Accommodation might be found out in Relation to the *Spanish* Succession; and that the Partition of the *Spanish* Dominions, in Case that King should die without Issue, was therein specified: That at the same Time the Lord *Sommers* receiv'd a Letter from His Majesty, intimating, that such Propositions had been made by Count *Tallard*, That His Majesty desir'd some Opinions in that Affair, which requir'd the greatest Secresy; And that His Majesty commanded the Lord *Sommers* to send full Powers to him under the Great Seal, with Blanks for the Names of Commissioners to treat with Count *Tallard*: That the said Lord *Sommers*, in a Letter to His Majesty, dated the 28 *Aug.* 1698. did humbly represent, That the entertaining such a Proposal as was mentioned by Count *Tallard*, seem'd to be attended with very many ill Consequences, if the *French* did not act a sincere Part: That he did consider the ill Prospect on the Death of the King of *Spain*; but so far as it related to *England*, it would be a want of Duty not to acquaint His Majesty, that there was a Deadness and Want of Spirit in the Nation universally, so as not at all to be disposed to the Thoughts of entring into a new War, and that they seem'd to be tired out with Taxes, to a Degree beyond what was discern'd, until it appear'd on the late Elections: That he observ'd several ill Consequences, as to *Europe* in general, that were likely to attend the propos'd Partition: That if the Treaty succeeded, he hop'd something would be stipulated for the
 Advantage

Advantage of *England*, as by letting them into the Trade of the *Spanish* Plantations, which would wonderfully endear His Majesty to his *English* Subjects, &c. That after the writing this Letter he heard no more of the Treaty, till he heard from Secretary *Vernon* that it was concluded, or was acquainted with the same, or the Design thereof, any otherwise than as afore-said; denies he advis'd it, but on the contrary, rais'd those Objections mentioned in his Letter, and hath thereby, as he conceives, faithfully discharg'd his Trust: That Secretary *Vernon* afterwards acquainted him that he had receiv'd a Copy of the Treaty, with two separate Articles, That he had His Majesty's Command to prepare the Instruments for the Ratification of the same, and to leave Blanks therein for the Names of the Commissioners of the States General, and that he brought the same so prepared to the Lord *Sommers*, to pass the same under the Broad-Seal, which was done accordingly, the said Lord *Sommers* having a lawful Warrant so to do, and the same was transmitted to His Majesty: But that the said Lord *Sommers* not being privy to the said Treaty in any other Manner, does not know when, or in what manner the same was communicated to the States General.

Art. 2. That the said Lord *Sommers* had presum'd to affix the Great Seal to the Commission for carrying on the said Treaty, without communicating the same to the rest of the Lords Justices, or the Privy Council: That Blanks were left for the Commissioners Names to be inserted beyond Sea; And that notwithstanding, an unlimited Power was granted thereby to treat with the Commissioners of the *French* King, and the States General, without any written Instructions to restrain them; and that His Majesty did thereby engage to ratify whatever shou'd be thereupon concluded.

Art. 3. That the said Lord *Sommers* had affix'd the said Great Seal without a lawful Warrant, and afterwards endeavour'd to procure a Warrant for affixing it.

That

That he conceiv'd His Majesty's said Letter a sufficient Warrant for affixing the Great Seal: 3. *Ans. to 2 and*

That he desir'd a particular Warrant only because it might be more proper to be produc'd, if Occasion requir'd, than His Majesty's Letter, which by Reason of other Matters therein contain'd ought not to be produc'd without His Majesty's Permission, and which is now made use of by His Majesty's Leave; and further says, That His Majesty having directed, his Commands shou'd be kept secret, he did not communicate the said Commission otherwise than as aforesaid.

That he affix'd the Great Seal to the Ratification of the said Treaty, without acquainting the rest of the Lords Justices, or a Privy-Council, tho' one entire Blank Sheet, and many other Blanks were left therein, to be fill'd up beyond Sea. Art. 4.

Admits that Secretary *Vernon* having prepared the Instruments of Ratification with such Blanks, he did affix the Great Seal thereto, as he conceiv'd he might lawfully do; That he did not communicate the same because of His Majesty's Command that it shou'd be kept secret; and that it wou'd have been to no Purpose, the Treaty having been perfected by His Majesty, and cou'd not be alter'd. *Ans. 4.*

That in 1699. another Treaty was entred into, pursuant to the said Treaty made in 1698, between the same Parties, and ratified under the Great Seal, whereby the Kingdom of *Spain*, on the Death of His Catholick Majesty, was to be divided, and many large Territories allowed to the Dauphin: Which was destructive to Trade, and alter'd the Balance of Power, &c. Art. 5.

He admits there was such a Treaty, and that it was once read before him and divers others of the Privy-Council: That he, as well as others, made several Objections to it, but were told by His Majesty's Plenipotentiaries, That the said Treaty was so far perfected, that it cou'd not be alter'd: That he did affix the Great Seal to the Ratification *Ans. 5:*

cation of it, as he was oblig'd to do, by His Majesty's Warrant.

Art. 6. That in Breach of his Duty, as Lord Chancellor, he had neglected to Enter or Enrol the aforesaid Commissions and Treaties.

Ans. 6. That the Care of Enrolling the same, if necessary, doth (as he conceives) belong to the Prothonotary of the Court of Chancery.

Art. 7. That the said Lord *Sommers*, contrary to his Oath as Lord Chancellor, while the Nation was engaged in an expensive War, and burthen'd with Debts, did pass many exorbitant Grants of the Lands and Revenues of the Crown; and did advise and procure many unreasonable Grants of the Forfeited Estates in *Ireland*, contrary to the Advice of the Commons, and His Majesty's Assurances thereupon to both Houses, and procur'd divers *Irish* Acts for confirming the said Grants, to be approv'd in Council in *England*, and remitted thither under the Great Seal.

Ans. 7. He admits, he did pass several Grants to divers Persons, under the Great Seal; but says, They were before pass'd through the proper Offices, and brought with sufficient Warrants, and that more considerable Grants have pass'd in the Times of most of his Predecessors. He denies he advis'd any Grants of the Forfeited Estates in *Ireland*, but that such Bills as were remitted to *Ireland* under the Great Seal, were first approv'd by the Privy-Council in *England*, and by Order of Council sent to the Lord *Sommers*, who was requir'd thereby to affix the Great Seal thereto.

Art. 8. That the said Lord *Sommers*, not being contented with the Profits of his Office as Chancellor, and an annual Pension of 4000*l.* allow'd him by

524. His Majesty, had, contrary to his Oath, procur'd many unreasonable Grants of the Lands and Revenues of the Crown for his own Benefit; particularly a Grant of the Mannors of *Rygate* and *Howleigh*, in the County of *Surrey*, of the Value of 12000*l.* That he had procur'd a Conveyance of as many Fee-Farm Rents as amounted to 800*l.* per Annum, to *Humphrey Hetherington*, Esq; and his

his Heirs, Fee-Farm Rents amounting to 600 *l.* per ann. to *Samuel Newton*, Esq; and Fee-Farm Rents amounting to 700 *l.* per ann. to *Richard Adney*, Esq; reciting, that the same were purchased by the respective Grantees, for valuable Considerations: Whereas no Consideration was actually paid, and that the said several Mannors and Rents aforesaid were granted to the said *Joseph Fekyl*, *Humphrey Hetherington*, *Richard Adney*, and *Samuel Newton*; and their Heirs, respectively, as aforesaid, in Trust for the said Lord *Sommers*, and his Heirs. 535

He admits, he receiv'd the Profits of his Office, *Ans. 8* and a Pension of 4000 *l.* per ann. which had been allow'd to several of his Predecessors; but denies he ever us'd any Means to procure any Grant from His Majesty for his own Benefit; and that His Majesty, of his meer Motion, in Consideration of his Services, did, in the Year 1697, grant the said Mannors of *Rygate* and *Howleigh* for his Benefit, as in the said Article is mentioned, but the same was far short of the Value therein suggested: That in the same Year His Majesty was pleas'd to direct that certain Fee-Farm Rents, to the Value of 2100 *l.* per ann. should be convey'd to the Use of the said Lord *Sommers*, and his Heirs; and that the Money mentioned in such Grants to be paid, was for the perfecting of His Majesty's intended free Gift, and not intended or design'd to make the Grantees of the said Rents appear to be Purchasers, but the said Lord *Sommers* always acknowledged he receiv'd the said Grants of His Majesty's Bounty; and he humbly conceives it was lawful for him so to do.

That he treated with one *Reginald Marriot* *Art. 9* Auditor of the Rates, and *John Digby* Clerk of the Trustees, for Sale of the said Fee-Farm Rents, and divers other Evil-disposed Persons, to discover to him such Rents as remain'd undispos'd of, in Order to beg the same; and for an Encouragement, contracted to give them as a Reward, one full fourth Part of all such Rents so disco-

discover'd: And that Grants were accordingly made to one *Heacok* and *Warner*, from the said Trustees to the Value of 500 l. *per ann.* and upwards, by the Direction of the said Lord *Sommers*, in Trust for the said *Marriot* and *Digby*.

Art. 10. That notwithstanding the Consideration Money in the said Conveyances, recited to be paid, amounting to 33600, there was not any Sum of Money really paid, but the same was fraudulently contriv'd by the said Lord *Sommers*, contrary to his Oath, in Deceit of His Majesty, &c.

Ans^r. 9, 10. He says, That after His Majesty had given Directions for granting the said Rents, and Warrants were sign'd by the Treasury, for conveying to him such Rents of the said yearly Value; the whole Benefit of His Majesty's Bounty would have been lost, without he could be inform'd what Rents remain'd undispos'd of: That thereupon he apply'd himself to the said *Marriot* and *Digby*, the only Persons that could inform him, who insisted on having a fourth Part of such Rents made over to them as they should discover; which the said Lord *Sommers* comply'd with, as he conceives he might lawfully do, it being only to his own Loss and Prejudice: And that no such Discovery was made till after the said Warrants from His Majesty, and the Treasury, as aforesaid: And says, the Consideration Money was not recited to be paid with any fraudulent Intent, but for the Reasons before in his Answer set forth.

Art. 11. That several of the abovesaid Rents were before appropriated to other Uses; and yet the said Lord *Sommers* procur'd them to be convey'd for his Benefit as aforesaid, to the great Vexation and Oppression of many of the King's Subjects, and the creating many new Charges on the Re-

Ans^r. 11. venues of the Crown.

He admits that several of the said Rents had been granted to other Persons, and that the same were inserted by Mistake, as had happened in former Grants, but denies that any Oppression or Vexation had happened to any of His Majesty's Sub-

Subjects thereby, and little or no new Charge to the Crown.

That the said Trustees of the said Lord *Sommers* had, by his Direction, surrendred several of the said Rents so granted to them, to the Value of 347 *l.* 11 *s.* and 5 *d.* on Suggestion that the same had been before convey'd to other Uses; and that the said Lord *Sommers* procur'd other Rents of the yearly Value of 391 *l.* and 3 *d.* $\frac{1}{2}$. to be convey'd to his said Trustees, for his Use; as if the said Rents so surrendred had been *bona fide* purchased in Pursuance of the Acts for the Sale of Fee-Farm Rents. Art. 12.

He admits that His Majesty having design'd him the said Rents to the annual Value in the said Grant mentioned; and that 347 *l.* &c. of the said Rents appearing to be granted before to other Uses, the said Trustees of the said Rents did, by Warrant from His Majesty and the Treasury, grant other Rents, in trust for the said Lord *Sommers*, and his Heirs, to the Value of 391 *l.* and 3 *d.* $\frac{1}{2}$ which were not granted as if the said Rents of 347 *l.* &c. had been *bona fide* purchased, but was in lieu and Reprize for the same, as granted of his Majesty's Bounty. Answ. 12. 327.

That the said Lord *Sommers*, in the Year 1695, together with the E. of *Orford*, and *Richard* Earl of *Bellamont*, procur'd a Commission for Capt. *Kidd*, (a Person of ill Fame, and since convicted of Piracy) to take divers Persons in the said Commission named, and all such Pirates as the said *Kidd* should meet with; with their Ships and Cargoes: And in the Year 1697 procur'd a Grant, which the Lord *Sommers* pass'd under the Great Seal, of all such Ships and Goods as belong'd to *Thomas Too*, *John Ireland*, *Thomas Wake* and *William Mare*, mentioned in the said Grant, to be Charg'd with Piracy, but never Convicted, or which belong'd to their Adherents, or to any other Pirates, and should be taken by the said *William Kidd*, or other Commander of the *Adventure-Galley*; unto the said *Richard* Earl of *Bellamont*, *Samuel Newton*, Gent. and others, with-
out Art. 13.

but rendering any Account, in which Grant the Name of the said *Samuel Newton* was used only in trust for the said Lord *Sommers*. Which Grant tended to the Discouragement of Trade, the Dishonour of the King and Kingdom, &c. and the said Lord *Sommers* by presenting and passing the said Grant, was guilty of a Breach of his Duty.

Ans^r. 13. The Lord *Sommers* admits, That His Majesty did grant a Commission to the said *William Kidd*, Commander of the *Adventure Galley*, as in this Article is mentioned; and that a Grant did pass the Great Seal, reciting, That whereas the said Earl of *Bellmont*, *Samuel Newton*, &c. had fitted out the said Galley at their own Cost; (which said *Newton* was named by and in trust for the Lord *Sommers*) His Majesty did grant, that all such Ships and Goods as are mentioned in this Article, and should be taken by the said *Adventure Galley*, should be to the Use of the said Owners, so far as the same could or might be granted by His Majesty. For that by Indenture between His Majesty and the said Owners, the said Owners did covenant to account for, and deliver upon Oath to the Use of the Crown, a clear tenth Part of all such Ships and Effects as should be taken by vertue of the said Commission; and that he conceives the said Grant did not tend to the Discouragement of Trade, or the Dishonour of His Majesty, &c. Nor was the passing the same a Breach of Duty in the Lord *Sommers*, the said Grant being form'd as a Recompense to the Grantees for fitting out the said Ship to execute the Powers in the said Commission, whereby the publick might have receiv'd a Benefit; had the said *William Kidd* discharg'd his Trust, which he failing to do, the said Owners had lost their Expences, and receiv'd no Benefit by the said Grant.

Art. 14. That the said Lord *Sommers* hath for several Years delay'd the Proceedings in the Causes before him, that he hath revers'd Judgments in the Court of Exchequer, in the Absence of the Barons,

rons, contrary to the Statute; and that he hath affirm'd the Subjects might have Rights and Interests without any Remedy for them but by Petition to the King.

He denies he ever delay'd any Causes, or revers'd any Judgments given in the Court of Exchequer, but in the Presence of the Barons, or did ever deliver any Position destructive to Property, &c. Answ. 14.

And as to all other Matters, in the said Articles contain'd, That he is not guilty, &c.

Die Martis 20 Maij. 1701. The Earl of Orford A Message to desir'd a Day might be appointed for his Trial: the Commons And a Message was sent to the Commons, to acquaint them therewith, and to give them Notice with the E. of Orford. that Their Lordships find no Issue join'd by Replication of the House of Commons.

Also a Message to remind them that no Articles were exhibited against the Earl of Portland and the Lord Hallifax, which was a Hardship to the Persons concern'd, &c.

31 Maij. A Message was brought from the Commons, That they had prepar'd a Replication to the E. of Orford's Answer, but did not bring it up, because they thought proper to begin with the Trial of the Lord Sommers: And as to the other Message, it was Unparliamentary, and that they, as Prosecutors, were at Liberty to exhibit Articles in due Time, of which they were the proper Judges; and that the asserting the not having deliver'd them, was a Hardship, &c. tended to a Breach of that good Correspondence that ought to be betwixt the Two Houses. 529.

Die Veneris 20 Maij. A Message was sent to The E. of Orford's Trial the Commons, to acquaint them that the Lords had appointed Monday the 9th of June, for the appointed. Trial of Edward Earl of Orford, and that the Commons may reply if they think fit: Also another Message to remind them, no Articles were exhibited against the Earl of Portland, or the Lord Hallifax, which was a Hardship, &c.

Disputes between the Houses, concerning the Methods of proceeding on Impeachments.

5 June, A Message was brought from the House of Commons by Mr. *Harcourt*, That in Answer to their Lordships Message on the 30 *Maij*. the Commons think it their undoubted Right, when several stand Impeach'd, to bring such of them first to Trial, as the Commons apprehend, from the Nature of the Evidence, ought first to be proceeded against, and that no Day ought to be appointed by your Lordships, without a previous Signification: That the Commons are ready: And that the Commons cou'd not agree to the Day appointed: That their frequent Repetition of the other Message, concerning the Articles against the two other impeach'd Lords, manifestly tended to the Delay of Justice, by introducing Disputes, in Breach of that good Correspondence that ought to be preserv'd between the Two Houses.

530.

Order'd by the Lords, That the Lord Great Chamberlain attend His Majesty, to acquaint him, That they have appointed *Monday* the 9th of *June*, for the Trial of *Edward* Earl of *Orford*, in *Westminster-Hall*, and that he will be pleas'd to order a Place to be prepar'd in the *Hall* for the Trial, against the said Time.

The Lord Chamberlain acquainted the House, That he had attended His Majesty, who was pleas'd to say he wou'd give Orders for a Place to be prepared.

531.

4 June, The Lords sent a Message to the Commons, to acquaint them, The Lord *Sommers* had desir'd a Day might be appointed for his speedy Trial, and that their Lordships find no Issue join'd by Replication of the House of Commons, That they will proceed to the Trial of such of the Impeach'd Lords first, as the Commons desire; so as there be no unreasonable Delays: That upon searching their Journals, they do not find, that after a general Impeachment there has ever been so long a Delay in bringing up the particular Articles: And that they do assert their Right of limittin a convenient Time for the Trial.

532.

6 June,

6 June, The Houses agreed on a Conference on the Subject of the abovesaid Message: Where Mr. *Harcourt* propos'd, That a Committee of both Houses might be nominated, to consider of the most proper Ways and Methods of proceeding on Impeachment according to the Usage of Parliament.

The Commons insist on a Committee of both Houses, to settle the Preliminaries of the Trial.

The Lords order'd a Committee to inspect their Journals, *Die Sabbati 7 Junij. 1701.* The Lord *Stamford* reported, That the Lords Committee had inspected the Journals: And the Precedents were read.

9 June, And a Message was sent to the Commons, That the Lords having agreed to proceed to the Trial of such of the Lords as the Commons should be first ready to begin with, the Commons had no Occasion to begin any Dispute on that Head, and that their Lordships did not care to enter into a Controversy, which was of no Use at present: That their Lordships were oblig'd to insist on their undoubted Right of appointing the Day of Trial, without any previous Inclination of the Commons Readiness: That the Lords wonder the Commons shou'd make use of such Expressions as had never been made use of by one House of Parliament to another, and which if return'd, must destroy all good Correspondence.

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That they cannot apprehend with what Colour their calling upon the Commons for Articles of Impeachment, can be said to tend to the Delay of Justice; and that therefore the Commons ought to have forborn that Reflection.

10 June, A Message was brought from the Commons, by Mr. *Harcourt*, importing, That the Commons insisted on a Committee of both Houses, to adjust the Preliminaries to the Trials, particularly, Whether the impeach'd Lords shall appear at their Lordship's Bar as Criminals, Whether they shall sit as Judges on each others Trials for the same Crimes, and Vote in their own Cases, as they have done since they were impeach'd, &c. And that if they shou'd not in-

sist on a Committee to settle these Points, they shou'd give up the Rights of the Commons of England, and make all Impeachments, the Bulwark of our Liberties, impracticable for the future.

535.

A Message was sent to the Commons, That the Lords have appointed *Friday* next for the Trial of *John Lord Sommers*.

11 *June*, A Message was brought from the Commons by Mr. *Harcourt*, That their Lordships having appointed *Friday* next for the Trial of the Lord *Sommers*, had not nominated any Place for the Trial: That their Lordships had taken up longer Time to give an Answer to the Commons concerning a Committee, than they had allow'd the Commons to prepare for the Trial: That they take their appointing so short a Day as such a Hardship to them, and such an Indulgence to the Person accused, as is not to be parallel'd.

That the Commons having Experience of the Interruption of a former Trial, for want of settling Preliminaries, obliges them to insist on a Committee of both Houses, for preventing the like Interruption: And that they insist on another Day for the Trial of the Lord *Sommers*.

Reasons given by the Lords, at a Conference, why they cou'd not comply with the Commons.

The Lords
Reasons why
they cannot
consent to a
Committee.

First, *They do not find that ever such a Committee was appointed on an Impeachment for Misdemeanors.*

Secondly, *That altho' such a Committee was appointed on the Impeachments of the Earl of Danby, and the five Popish Lords, for High Treason, they observ'd, That after much Time spent in Disputes, it only occasion'd the abrupt Conclusion of a Session of Parliament.*

Thirdly, *That the Methods of Proceedings on Impeachments were so well settled, that they did not foresee any Difficulties likely to happen, at least, none have been yet stated to them.*

Fourthly,

Fourthly, They observe that this Proposal of the Commons comes so very late, that their Lordships can expect no other Fruit of such a Committee, but the preventing of the Trials during this Session: And that if any unforeseen Difficulties should arise, their Lordships will be ready to comply with the Commons in removing them.

A Message was sent to the Commons in Answer to the Message brought from them the 10th of June, by Mr. Harcourt; That for the avoiding Disputes, &c. they think fit to acquaint the Commons with the following Resolutions of the House of Lords.

536.1

1. That no Lord of Parliament impeach'd of The im-
High Crimes and Misdemeanors, and coming to peach'd Lords
his Trial, shall upon his Trial be without the may be with-
Bar. in the Bar, at
2. That no Lord of Parliament, impeach'd of the Trials,
High Crimes and Misdemeanors, can be preclud- and Vote in
ed from Voting on any Occasion, except in his each other's
own Trial. Case.

And their Lordships take notice of a Mistake in Point of Fact, alledg'd in the Message of the Commons; it no way appearing upon their Journals, that the Lords impeach'd have Voted in their Case: And that their Lordships Management having been according to the Usage of Parliaments; they have Reason to expect the Trials should proceed without Delay.

Another Message was sent to the Commons, to acquaint them; That nothing was farther from their Lordships Thoughts, than the going about to do any thing that might have the least Appearance of Hardship in Relation to the Commons: But that the Answer of the Lord Sommers being sent to the Commons the 24th of May, and the Commons signifying their Intention of beginning first with the Trial of his Impeachment, considering how far the Session was advanc'd, thought it reasonable to appoint the 13th Instant for his Trial, finding several Precedents

537.

Trial of the
L. Sommers
appointed the
13 June.

of appointing Trials on Impeachments, within a shorter Time. Nevertheless, that the Commons may see how desirous their Lordships are to comply with them, they have appointed the Trial of *John Lord Sommers* on *Tuesday* the 17th of this Instant *June*, in the House of Lords, which will be then Sitting in *Westminster-Hall*.

13 *June*, A Message was brought from the Commons by *Mr. St. John*; That the Commons find greater Reasons to insist on their Proposal of a Committee of both Houses from the Ambiguity of the two Messages receiv'd Yesterday.

That the Commons have been obliged to employ that Time in considering and answering their Lordships Messages, which otherwise wou'd have been spent in preparing for the Lord *Sommers's* Trial, so that the Delay must be charg'd where the Occasion ariseth, and cannot but think it strange their Lordships should come to Resolutions upon two of those Points, while the Proposal of the House of Commons is under Debate at Conferences between the Two Houses, the Commons having other Difficulties to propose, which concern them as Prosecutors, and all future Impeachments.

And tho' the Commons leave the Subject of your Lordships Resolutions, with other Things, to be debated at a Committee of Both Houses, yet they cannot but observe, that Your Lordships second Resolution is no direct Answer to the Commons Proposal, viz. *Whether Peers impeach'd of the same Crimes, shall Vote for each other, upon their Trial for the same Crimes?* And as to what Your Lordships observe, That there is a Mistake in Point of Fact, alledg'd by the Commons; they take notice of the Caution us'd by your Lordships in that Part of your Message: For tho' the appearing or not appearing upon Your Lordships Journal, does not make it more or less agreeable to the Rules of Justice, yet the Commons cannot but add this further Observation from Your Lordships Journal, That the Impeach'd Lords Presence is not only recorded, when

when these Votes pass'd, but they also find some of them appointed of Committees for preparing and drawing up the Messages and Answers to the House of Commons; which they do not think has been the best Expedient for preserving a good Correspondence, and therefore the Commons cannot think it agreeable to the Rules of Parliament, for them to appear at a Trial, till all necessary Preliminaries are first settled with Your Lordships.

A Message was brought from the Commons, to desire a Conference. To which the Lords agreed.

The Lord Steward reported, That the Lords had attended the free Conference, that Mr. *Harcourt* opened the free Conference, and argued against the Reasons given by this House, why they could not agree to a Committee of Both Houses; and that the Lord *Haversham*, in Answer to some part of the Arguments of Mr. *Harcourt*, and Sir *Barth. Shower*, used some Expressions, at which the Commons taking Exceptions, abruptly broke up the Conference.

Exceptions taken to some Words of the Lord *Haversham's*.

A Message was sent to the Commons, to desire they would come again presently to the said free Conference, as the best Expedient to prevent a Misunderstanding.

A Message was brought from the Commons, by Sir *Chris. Musgrave*, to acquaint their Lordships with what had happen'd, viz. The Words spoken by my Lord *Haversham*, which were as follows:

538.

One Thing there is, tho' I can't speak to it, because I am bound up by the Orders of the House; yet it must have some Answer: That is, As to the Lords Voting in their own Case: It requires an Answer, tho' I can't go into the Debate of it. The Commons themselves have made this Precedent, for in these Impeachments they have allow'd Men guilty of the same Crimes, to Vote in their own House; and therefore we have not made any Distinction in our House, that some shou'd Vote, and some not. The Lords have so high an Opinion of the Justice of the

The PROCEEDINGS against

House of Commons, that they hope Justice shall never be made use of as a Mask for any Design. And therefore give me leave to say (tho' I am not to argue it) 'tis a plain Demonstration that the Commons think these Lords innocent: And I think the Proposition is undeniable; for there are several Lords in the same Crimes, in the same Facts, there is no Distinction; and the Commons leave some of these Men at the Head of Affairs, near the King's Person, to do any Mischief if their Persons were enclined to it; and impeach others, when they are both alike guilty, and concern'd in the same Facts. This was a Thing I was in hopes I should never have heard asserted, when the Beginning of it was from the House of Commons.

And to communicate this Resolution to their Lordships.

Charge a-
gainst the L.
Haversham.

Resolv'd, That *John Lord Haversham* be Charg'd before the Lords, for the Words spoken by the said Lord this Day, at the free Conference; and that the Lords be desir'd to proceed in Justice against the said Lord *Haversham*, and to inflict such Punishment upon the said Lord, as so high an Offence against the House of Commons doth deserve.

Die sabbati 14 Junij 1701.

Articles a-
gainst the L.
Hallifax.

A Message from the House of Commons, by *Mr. Bruges*, with the Articles of Impeachment against *Charles Lord Halifax*, and also to demand he may give Security, &c.

Art. I. That whereas the Commons, by an Address to His Majesty, on the 4th of *March*, 1692, did beseech His Majesty, That no Grant might be made of the forfeited Estates in *Ireland*: To which he was pleas'd to give a most gracious Answer: And whereas it was the Duty of every Minister of State to have had so much Regard to the House of Commons and His Majesty's Honour, as to have dissuaded the passing of such Grants; yet *Charles* (now) Lord *Hallifax*, then the Honourable *Charles Montague*, Esq; being a Member of the

the House of Commons, one of the Lords of the Treasury, &c. hath since the 4th of *March* 1692, presumed to advise and pass a Grant to *Thomas Railton*, Esq; in Trust for himself, of several Debts, Interests, and Sums of Money, accruing out of the said Forfeited Estates, amounting to 13000 *l.* whereby he hath contributed to the Debts of the Nation, the levying heavy Taxes, &c.

The Answer of *Charles Lord Hallifax*, to the Articles of Impeachment against him.

He admits there was such an Address of the Commons to His Majesty, and such Answer thereto, as in the said Article is set forth: But that in the Years 1693, 1694, 1695, the Parliament passing no Act touching the said Forfeited Estates, His Majesty did grant to several Persons, who had serv'd him in *Ireland*, some of the said Estates, as a Reward: He denies that he ever ask'd or procur'd any Grant from His Majesty, but acknowledges, that in *May*, 1697, His Majesty, in Consideration of his Services, and as a Mark of his Grace and Favour, did grant unto *Thomas Railton*, Esq; in Trust for the said Lord *Hallifax*, several Debts, &c. amounting to 11546 *l.* which he conceives he might lawfully accept, and saith, the said Grant hath since been taken away by Parliament, and that he hath not made clear thereof above 500 *l.* and hopes the said Grant hath very little, if at all, contributed to the National Debts, or levying Taxes, &c.

That whereas, by an Act made in the Twelfth Art. 2: Year of His Majesty's Reign, it was enacted, That all Persons who had receiv'd any Grant from His Majesty, out of the said Forfeited Estates, should repay all such Sums as they had receiv'd by vertue of such Grant, into the Exchequer in *Ireland*, before the 24th of *August*, 1700, and the said Lord *Hallifax*, by vertue of the said Grant to *Thomas Railton*, Esq; in Trust for him, had receiv'd the Sum of 1000 *l.* yet he hath not repaid the said Sum of 1000 *l.* Which is a manifest

manifest Wrong to His Majesty and the Publick, &c.

Ans. 2. He admits that such an Act did pass; but says, there was a Clause in the said Act, That the Grantees shou'd not be accountable for the Profits by them receiv'd, before 2d of November, 1699, but might retain the same; and says, that the 1000 *l.* mentioned to be receiv'd to his Use, was receiv'd before that Time, and that he made no more than 500 *l.* clear thereof, as in his Answer to the first Article: And denies that the Non-payment thereof into the Exchequer, is any Wrong to His Majesty, or the Publick, &c.

Art. 3. That the said Lord *Hallifax* being a Member of the House of Commons, a Commissioner of the Treasury, Chancellor of the Exchequer, and a Privy-Counsellor, not contented with the excessive Gains he made of those Places, contrary to his Oath as a Privy-Counsellor, &c. when the Nation was engaged in an expensive War, and under heavy Debts, did not only procure divers Grants to others in *England* and *Ireland*, but obtain'd several beneficial ones for himself; which Practices were an Abuse of His Majesty's Goodness, a Breach of Trust, and an Oppression of the Subject.

Ans. 3. He admits he enjoy'd the Places mention'd in this Article, and says, he serv'd His Majesty faithfully, and was contented with the lawful Fees and Profits of the said Places: That His Majesty, in Consideration of his Services, did make the Grant in the preceeding Article, and the Grant mentioned in the Answer to the subsequent Article, which were all the profitable Grants he, or any in Trust for him, ever had from His Majesty; and conceives, the accepting such Grants were no Abuse of His Majesty's Goodness, &c. That he never acted contrary to his Oath, or the Interest of his Country, or advised the passing of any Grants whatsoever. But that in Conjunction with the other Commissioners of the Treasury, he did sign several Warrants for such Grants as His Majesty was pleased to

to direct to be pass'd, which he was obliged to do by the Duty of his Place.

That the said Lord *Hallifax*, not regarding his Art. 4. Duty to His Majesty or the Publick, but pursuing his private Interest, did, by Letters of Privy-Seal, 541. dated the 6th of *May*, 1697. procure a Grant to *Henry Segar*, Gent. in Trust for himself, of the Sum of 14000*l.* to be raised by the felling of scrubbed Beach, &c. in His Majesty's Forest of *Dean*, within the space of seven Years, from the 25th of *Decemb.* 1697. under Colour of which Grant, Beech of a much greater Value, Sapling-Oaks, and many Tuns of well-grown Timber, were fallen and sold for the Benefit of the said Lord *Hallifax*.

His Lordship denies he at any Time preferred *Answ.* 4. his private Interest to that of the publick; but admits there was such a Grant as in this Article is mentioned, which Grant cou'd not be prejudicial to any Timber growing in the said Forest, and believes no Sapling-Oaks or Timber was cut down by Colour of the said Grant; that he gave no Directions about the falling the Scrubb; but it was done by His Majesty's Surveyor and other Officers, who, as he has been inform'd, faithfully discharg'd their Trust, and took particular Care to preserve the Timber there.

That whereas the Wisdom of the Nation has Art. 5. provided distinct Officers, with beneficial Salaries in the Treasury, in Order that they may be a Check to each other, and that no Loss may accrue to the Publick, yet the said Lord *Hallifax*, being one of the Lords of the Treasury, (when by the Death of *Sir Robert Howard*, the Office of Auditor of the Receipts and writer of the Tallies became vacant) not regarding the Constitution of the Treasury, he procur'd a Grant to *Christopher Montague* his Brother, (then a Commissioner of Excise,) of the said Office of Auditor, in Trust, as to the Profits thereof, for himself; so that the said Lord *Hallifax* was, in effect, at the same Time Commissioner of the Treasury, Chancellor of

of the Exchequer, and Auditor of the Receipts, and Writer of the Tallies, which are manifestly inconsistent, and ought never to be trusted in the same Person, and which open'd a Way to all manner of corrupt Practices, in the future Management of the Revenues.

542.

Answ. 5. He admits he was a Commissioner of the Treasury, when, by the Death of Sir Robert Howard, his Office of Writer of the Talleys, and Counter-Talleys, commonly called, Auditor of the Receipts of the Exchequer became vacant, and that the Commissioners of the Treasury, of whom he was one, did grant the said Office to *Christopher Montague* his Brother, which he admits was done at his Request; but insists, the same was not done contrary to the ancient Constitution of the Treasury; That he did intend in a short Time to leave his other Places in the Treasury, and obtain a Surrender from his said Brother of the said Office, and procure a Grant thereof to himself: And saith his said Brother executed the said Office, till after he the said Lord had laid down his other Places, and then, and not before, his Brother surrendred the said Office, and the said Lord obtain'd a Grant thereof, as he conceives he might lawfully do, and that the said several Offices, as they were executed, were not inconsistent with one another, and is very sure the Publick was no ways prejudiced by the Execution of the same.

Art. 6.

543.

That the said Lord *Hallifax* advised the Treaty of Partition, (*Which is recited in the first Article against the Lord Sommers*) well knowing the evil Consequences, as well as the Injustice thereof.

Answ. 6.

He denies he ever saw the said Treaty, or was ever consulted about it, or does yet know the Articles it contains; he says Mr. Secretary *Vernon* did once send for him, and discourse with him and others, upon an Intimation that was given by a Letter from the Earl of *Portland*, that the French King was dispos'd to commence a Negotiation upon Terms that were then mentioned, to prevent a War in Case of the King of *Spain's* Death; and

and afterwards the same Matter was discours'd between the Secretary, the then Lord Chancellor, and the said Lord *Hallifax*, at *Tunbridge-Wells*, where he the said Lord *Hallifax* made several Objections to the same; and that he was never afterwards consulted in that Matter, or knew how it proceeded; and saith, as he cannot tell what the Effects of the Treaty might have been, if it had been observ'd, so he insists, that he is not nor ought to be, answerable for the same.

14 June, A Message was sent to the Commons to desire a present free Conference in the Painted-Chamber, upon the Subject Matter of the last free Conference.

Eodem die, A Message was brought from the Commons by the Lord *Cheyney*, That it was not consistent with the Honour of the Commons, to renew the free Conference, until their Lordships have done Justice upon the Lord *Haversham*, for the Indignity offer'd Yesterday to the House of Commons. The Commons refuse a Conference, till they have Justice against the L. *Haversham*.

The Lord Steward reported from the Committee appointed to draw up what was offer'd at the free Conference, That Mr. *Harcourt* entring into a Debate against the two Resolutions of the House, relating to Impeachments, used this Expression, *That he wish'd their Lordships had sent their Reasons as well as their Resolutions*; and that Sir *Bartholomew Shower*, against the latter of the said Resolutions did affirm, *That such a Proceeding would be abhorrent from Justice*. In Answer to which the Lord *Haversham* used some Expressions the House of Commons took Exceptions at; That the Lord *Haversham* desir'd to be heard out, and that the Words he had spoken might be writ down; but the Managers for the Commons broke up abruptly.

Resolv'd by the Lords, That they will insist on their Resolution, Not to have a Committee of both Houses, touching the Trial of the impeach'd Lords. 544.

Leave desir'd
that such Wit-
nesses as were
Members of
the House of
Commons
might attend
the Trial.

A Message was sent to the Commons, that Leave might be given to such of their Members as shou'd be Witnesses in the Trial of the Lord *Sommers*, might attend at the Trial, and that the Letter wrote by His Majesty, and now in the House of Commons, might be produced at the Trial.

The Lords resolv'd on an Address to His Majesty, That he will be pleas'd to order the Treaty of Partition, and some Letters relating thereto, to be laid before the House.

The Order to be observ'd in the Trial of the impeach'd Lords was agreed on.

545. Order'd, That Serjeant *Pratt* be assigned Council for the Lord *Sommers*.

Another Order was made for his Witnesses to attend.

A Message was sent to the House of Commons, That their Lordships have order'd the Lord *Haversham* a Copy of the Charge against him, and that he do put in his Answer thereunto, in order to bring that Matter to a speedy Judgment.

Die Martis 17 Junij. 1701. A Message was brought from the Commons, by the Earl of *Dysart*, to acquaint this House, That the Commons, in this whole Proceeding against the impeach'd Lords, have acted with all imaginable Zeal to bring them to a speedy Trial; and they doubt not but 'twill appear, by comparing their Proceedings with all others upon the like Occasion, that the House of Commons have nothing to blame themselves for, but that they have not expressed the Resentment *their Ancestors* have justly shew'd upon much less Attempts, which have been made upon their Power of Impeachments.

546. Then the Commons proceed, and recapitulate the whole Transaction: And lastly, declare these to be some of the Reasons why they peremptorily refuse to proceed to the Trial of the Lord *Sommers*, this 17th of *June*.

First,

First, *Because their Lordships have not agreed that a Committee of both Houses be appointed to adjust the necessary Preliminaries: A Method never before denied.*

The Commons
Reasons why
they will not
proceed to
the Trial of
the L. Som-
mers.

Secondly, *That they can never appear as Prosecutors before their Lordships, till their Lordships have given them Satisfaction, that the Lords impeach'd of the same Crimes shall not sit as Judges on each others Trials for those Crimes.*

Thirdly, *Because the Commons have as yet receiv'd no Reparation for the great Indignity offer'd to them at the free Conference, by the Lord Haverham: That they are far from any Inclination of delaying my Lord Sommers's Trial, having full Evidence against them, which they will be ready to produce as soon as their Lordships have done Justice upon the Lord Haverham; and the necessary Preliminaries in order to the said Trial, shall be settled by a Committee of both Houses.*

A Message was sent to the Commons, (on the 20th Instant,) That the Lords do not understand what the Commons mean by *that Resentment* they speak of in their Message: Their Lordships own the Commons have a Right of impeaching, and the Lords have an undoubted Right of doing Justice upon those Impeachments, by bringing them to Trial, and condemning or acquitting the Parties, in a reasonable Time. This Power is deriv'd to them from their Ancestors, which they will not suffer to be wrested from them by any Pretences whatsoever.

That there never was a Committee of both Houses yielded to by the Lords, in Case of any Impeachment for High Crimes and Misdemeanors.

That as to the Preliminaries to be settled by such a Committee, they have receiv'd the Resolution of the Lords, from which (being Matters relating entirely to their Judicature) their Lordships cannot depart.

That as to the last Pretence the Commons make to shelter the delaying the Trials, from some Expressions

pressions which fell from my Lord *Haversham*, they observe,

First, That they have omitted nothing which might give the Commons all reasonable Satisfaction, of their Purpose to do them Justice, so far as is consistent with doing Justice to that Lord.

Secondly, That this Business has no Relation to the Trials of the impeached Lords: And therefore their Lordships cannot imagine why the Commons shou'd make Satisfaction and Reparation against the Lord *Haversham*, a necessary Condition for the going on with the Trials, and at the same Time find no Difficulty in proceeding on other Business.

547. A Message was sent to the Commons (17th June) that the Lords intend presently to proceed to the Trial of *John Lord Sommers*, in *Westminster-Hall*.

The Messengers being return'd, acquainted the House that the Commons were adjourn'd.

It was resolv'd, That the Earl of *Orford* and Lord *Hallifax* have leave to withdraw, at the Trial of the Lord *Sommers*.

Some further Directions were given in Order to the Trial in the Hall.

The Lords go Then the House adjourn'd to *Westminster-hall*, to the Trial and the Lords were called by the Herald, and of the L. *Sommers*. went as order'd, and being seated in the Hall, the House was resum'd.

Then Proclamation was made, in the King's Name, for Silence.

Then the Lord Keeper ask'd leave for the Judges to be cover'd. Which was agreed to.

Then Proclamation was made for the Prosecutors to appear, and make good their Charge.

After which, the Articles against the Lord *Sommers* were read, and His Lordship's Answer.

Then Proclamation was made again for the Prosecutors to appear, &c.

And the Lord Keeper declar'd, the House was ready to hear the Evidence.

The

The Lord *Sommers* mov'd to have his Council heard; whereupon the House adjourn'd to the House above: And the House being mov'd to acquit the Lord *Sommers*, it was resolv'd, The Question should be put in the House below: Then Lord *Sommers* the House adjourn'd to *Westminster-hall*, and the acquitted. Lord Keeper put the Question, and ask'd every Lord, Content or not Content?

The Lord Keeper declared, the Majority was 548. for acquitting him: And then declared, That *John* Lord *Sommers* was acquitted of the Articles of Impeachment, &c. And the Impeachment was adjudg'd to be dismiss'd.

A Message was sent to the Commons, That Another Day this House hath appointed *Monday* the 23d of appointed for this Instant *June*, for the Trial of *Edward* Earl the Trial of of *Orford*, in *Westminster-hall*. the E. of *Orford*.

A Message from the Commons, (*June* the 20th) *ford*. That in Answer to the Message of the Lords, appointing *Monday* next for the Trial of the Earl of *Orford*, that the Lords have been acquainted, that the Commons wou'd proceed in the first place against the Lord *Sommers*, and they are ready to go to that Trial, as soon as they have receiv'd Satisfaction for the Affront offer'd them, &c.

The Answer of *John* Lord *Haversham* to the 549. Charge exhibited against him by the Commons, for Words spoken at a free Conference, the 13th of *June*, 1701.

The said Lord saying to himself all Advanta- *L. Haversham's* ges, &c. says, That on the 6th of *June*, the Com- Answer to the mons, by a Message sent the Lords, desir'd a free Charge a- Conference, at which they propos'd a Committee gainst him, of both Houses might be nominated, to consider of the most proper Methods of proceeding on the Impeachments of the Lords, according to the Usage of Parliament. And then goes on to recite what had pass'd at the several Conferences afterwards to the 13th of *June*. He admits, That at the Conference on the 13th, he did, in An-

swer to what Mr. Harcourt and Sir Bartholomew Shomers had said, use Expressions to this Effect, *viz.*

550.

One Thing there is which a worthy Member mentioned, tho' I can't speak to it at large, because I think my self bound up by the Resolutions of the House, yet it must have some Answer, (that is) as to the Lords Voting in their own Case; it requires an Answer, tho' I cannot enter into the Debate of it. The Commons themselves have made this Precedent, for in these Impeachments they have allow'd Men; equally concern'd in the same Facts, to Vote in their own House: And we have not made the Distinction in ours, that some should Vote, and some not. The Lords have so high an Opinion of the Justice of the House of Commons, that they believe Justice shall never be made use of as a Mask for any Design: And therefore give me leave to say, tho' I am not to argue it, 'Tis to me a plain Demonstration, that the Commons think these Lords innocent; and I think the Proposition is undeniable: For when there are several Lords in the same Circumstances, in the same Facts, there is no Distinction; and the Commons leave some of these Men at the Head of Affairs, near the King's Person, to do any Mischief, if they were inclinable to it, it looks as if they thought them all innocent. This is a Thing I was in hopes I should never have heard asserted, when the Beginning of it was from the House of Commons.

Now the said Lord denies he had any Design to reflect on the Honour of the House of Commons, but says, he was led to express himself in the Manner aforesaid, for the Reasons aforesaid; and takes himself to be justified therein by the Facts and Reasons following, (*viz.*)

That the Nature of that Conference was, that it should be free; the Occasion of it, Because either House apprehended the other to be in an Error; and the End of it, That each Side might urge such Facts as are true, and such Reasons as are forcible to convince; That the Earl of Jersey, and Secretary Vernon, who sign'd and promoted the Partition-Treaty, were actually left at the Head of

of Affairs, without Complaint, while these Lords were impeach'd for the same Facts; That Sir Edmond Seymour, Sir Stephen Fox, and Mr. Pelham, who were Commissioners of the Treasury with the Lord Halifax, and pass'd the same Grants for which he is accus'd, were permitted to Sit and Vote in the House of Commons, touching these Impeachments; therefore the Commons had no Reason to insist, the Lords should not permit that in their Members, which the Commons had first permitted, and continued to permit; That the Word *Innocent*, used by the said Lord *Haversham*, can extend no further, than to such Matters as were done by the impeach'd Lords, of the same Nature with what was done by those unimpeach'd. All which Facts being true, and the Consequences obvious, the said Lord being ready to prove the same, he insists that the Words spoken by him at the said free Conference, were not scandalous or reproachful, nor false or reflecting on the Honour or Justice of the House of Commons, but were spoken on a just Occasion, given by the Managers of the House of Commons, &c. and demands the Judgment of this honourable House: And he denies he spoke the Words specified in the said Charge, as they are there set down; but insists, that what he said at the said free Conference was agreeable to Truth, in Discharge of his Duty, and in Defence of the undoubted Right and Judicature of this House.

H A V E R S H A M.

A Copy of the Lord *Haversham's* Answer was sent down to the Commons.

Die Veneris 20 Junij. 1701. A Message was sent to the Commons, in Answer to the Message of the House of Commons of this Day; That the Commons might have known by the Records of the House of Lords, that the Lords have proceeded to the Trial of the Lord *Sommers* on *Tuesday* last, being the Day appointed, and the Commons not appearing to maintain their Articles against the

The PROCEEDINGS against

said Lord, they had acquitted him, and dismiss'd the Impeachment.

That the Lords will proceed to the Trial of the Earl of Orford on *Monday* next, being the Day appointed: That the Lords can infer nothing from the Commons insisting on that Demand for a Committee, but that they never design'd to bring any of their Impeachments to a Trial: And as to the Lord *Haversham*, the Lords intend to do Justice in the Matter.

21 Junij. Order'd, That the Earl of Orford's Witnesses do attend at his Trial.

552. *Die Luna* 23 Junij. 1701. Resolv'd by the Lords,

First, That the Resolutions of the Commons, in their Votes of the 20th Instant, contain most unjust Reflections on the Honour and Justice of the House of Peers, and are contriv'd to cover their affected and unreasonable Delays in Prosecuting the impeach'd Lords.

Secondly, That the said Resolutions do manifestly tend to the Destruction of the Judicature of the Lords, to the rendring Trials on Impeachments impracticable for the future, and to the subverting of the Constitution of the English Government.

Thirdly, That whatever ill Consequences may arise from the so long deferring the Supplies for this Year's Service, are to be attributed to the fatal Council of the putting off the Meeting of a Parliament so long, and to the unnecessary Delays of the House of Commons.

The E. of Orford acquitted. Then the House of Lords proceeded in the same Manner to the Trial and Acquittal of the Earl of Orford, as they had done in the Trial of the Lord Sommers: Only it is observable, that whereas there were several Negative Voices, when the Question was put for acquitting the Lord Sommers; in the Acquittal of the Earl of Orford the House was unanimous.

Die Martis 24 Junij. 1701

Order'd by the Lords, That the Charge preferr'd against the Lord *Haversham* be dismiss'd, for want of Prosecution.

553.
The Charge against the L. *Haversham* dismiss'd.

Order'd also, That the Impeachments against the Earl of *Portland*, and the Lord *Hallifax*, be dismiss'd for want of Prosecution.

The Impeachments against the E. of *Portl.* and L. *Hallifax* dismiss'd.

And the Commons having impeach'd *Thomas Duke of Leeds*, of High Crimes and Misdemeanors, the 27th of *April*, 1695, and on the 25th of that Month exhibited Articles against him; to which he answer'd.

Impeachment against the D. of *Leeds* dismiss'd.

Order'd, That the said Impeachment and Articles be dismiss'd.

The Trial of Colonel NICHOLAS BAYARD, in the Province of New-York, for High Treason, Anno Dom. 1701.

BEfore the Grand Jury were sworn, the Prisoner's Council objected against some of them, for having declar'd, *That if Bayard's Neck was made of Gold, he shou'd be hang'd*; but they were over-ruled by the Court: And the Charge being given, the Court adjourn'd till next Day.

556.
Objection to a Grand Jurymen, for saying the Prisoner should be hang'd.

On the 20th, the Court being met, Mr. *Weaver* the Solicitor General complain'd he was obstructed by some of the Grand Jury, who would not be satisfied with his being present at the Examination of the Evidence, and that they would send for other Evidence than were produc'd by him: Whereupon those of the Grand Jury who insisted on these Matters, were discharg'd, and others sworn in their room.

Whether the King's Council may manage the Evidence before the Grand Jury.

Bill found by
11 of the
Grand Jury
only.

21 Feb. The Grand Jury appearing in Court, the Indictment was given in by the Foreman, indors'd *Billa vera*, and sign'd with his Name; whereupon Justice *Atwood* immediately discharg'd the Jury, but the Prisoner's Council inform'd the Court, that the Bill was not found by twelve Jurors; and upon Examination it appear'd that eight of the nineteen Jurors were against finding the Bill: And those eight importun'd the Court, That the Foreman might be brought upon his Oath, That they only found the signing the Addresses, and not the Treason.

To which Justice *Atwood* reply'd, They were no longer Jurors, they had presented the Bill, and the Court was possess'd of it; it was now a Record, and there is no Averment against a Record.

And the Court order'd the Prisoner to be brought to his Trial on *Monday* the 2d of *March*.
557. 2d *March*, Mr. *Nicoll* the Prisoner's Council, mov'd, that the Indictment might be quash'd, not being found by twelve Men: And quoted several Authorities for it.

Just. *Atwood*. To go on upon this Head, Whether, or no, the Grand Jurors can be brought to reveal the Counsel, which they are sworn to keep secret, cannot be allowed.

Mr. *Emot*. May it please your Honour, I am join'd with Mr. *Nicoll*, as Council for the Prisoner, the Question is, Whether there can be any Averment against a Record? By 11 H. 4. it is enacted, That a Grand Jury shall consist *de bonis & legatibus hominum*; and so runs the *Venire*, and for want of such Persons, that Statute declares the Indictment void: So that it is a good Exception to an Indictment, to aver that any one of the Grand Jury was an Alien; which is Matter of Fact. Now how shall this Averment be made, if so be there be no Averment against a Record?

Just. *Atwood*. The Statute gives the Particulars that may be averr'd, and no other can be allow'd: If the Jury, as to the Fact in the Indictment, had found *Billa vera*, and as to Treason, *Ignoramus*.

mus, the Bill had been void, and the Court must have taken notice of it; but to this Bill there is no Indorsement but *Billa vera*. Besides, a Grand Jury is but an Inquest of Office, and an Inquest of Office may be found by a less Number than twelve.

Mr. *Emot*. I have another Objection, That the Juries ought to be return'd under the Hands and Seals of the Commissioners; and there is no Distinction between the Grand Jury and the Petit Jury.

Just. *Atwood*. There is something in that, as to the Petit Jury, but this does not at all affect the Grand Jury. 558.

The Prisoner was set to the Bar.

Clerk. *Nicholas Bayard*, Hold up thy Hand.

You stand Indicted, &c.

The Indictment sets forth, That *Nicholas Bay-* The Indict-
ard, of the City of *New-York*, in the Province of *ment*.
New-York, in *America*, Esq; on the 10th of *De-*
cember in the 13th Year of the King, in the Dock
Ward of the said City and County of *New-York*,
and divers other Days and Times, as well before
as after, did compass, imagine, and contrive, to
alter and subvert His Majesty's Government of
New-York: And to that End, did use divers indi-
rect Practices to procure Mutiny and Desertion
among the Soldiers belonging to His Majesty's
Fort and Garison of *Fort William Henry*, in or near
the said City and County of *New-York* aforesaid,
and did draw in Numbers of the said Soldiers
and others, to sign false and scandalous Li-
bels against His Majesty's said Government,
which Libels were also sign'd by the said *Nicho-*
las Bayard: That amongst other Things reflecting
on the Administration of the Government, it is
insinuated in the said Libels, That His Majesty's
Subjects within this Province have been *Oppres-*
sed by the Persons intrusted with the Admini-
stration of the said Government, and that the
said Government hath been rendred *Cheap and*
Vile, in the Eyes of the People: As also, that
the present *General Assembly of this Province is not*

a lawful Assembly; by which said malicious Scandals, contain'd in the said Libels, he the said *Nicholas Bayard* hath incited His Majesty's Subjects of this Province to disown the present Authority and Government thereof, and cast off their Obedience to His Majesty's said Government; against the Duty of his Allegiance, against the Peace, &c. and against an Act of the General Assembly for establishing and securing His Majesty's present Government.

To which Indictment the Prisoner pleaded, Not Guilty.

Prisoner. I desire I may be allow'd two Clerks to take the Minutes of the Trial.

Just. *Atwood.* Your Solicitor may take Notes, but no other will be suffer'd to do it.

Mr. Sol. Gen. Perhaps the Council will not insist on the Mistake in the *Venire*.

559. Just. *Atwood.* But we will have it amended. And thereupon a Precept was directed to the Sheriff, under the Hands and Seals of the Commissioners, to return a Petit Jury the 6th Instant: To which Day the Court adjourn'd.

March 6th, the Court sat, and the Prisoner was brought to the Bar, and the Petit Jury being call'd, consisting of eighty Persons, and some of them not appearing, the Court order'd the Defaulters to be amerc'd Ten Pounds, if they did not appear in the Afternoon; and adjourn'd. The Court being sat in the Afternoon, Mr. Solicitor General mov'd they might adjourn till the next Morning, the King's Evidence being drunk: Granted.

March the 7th, the Court met, and one *Person* being observ'd to take Notes, was forbid.

Att. Gen. refuses to Prosecute according to the Directions of the Court, and having given an Opinion in this Cause opposite to the Lieutenant Governor and Council, a Minute was made of it.

A Petition of the Prisoner's was read, complaining of the Hardships of the Bill being found against

against him but by eleven of the Grand Jury: And that not one of the Grand Jury were of *English* Extraction, but all of them *Dutch*; as were also the Petit Jury, (except five or six,) and that they did not understand the Language, &c. and desires their Honours wou'd consider the Premises, and grant him some Relief therein.

Just. *Arwood*. Let a Minute be enter'd that the Petition was read, and that it does appear to the Court, that the Bill was found by more than 12 of the Grand Jury.

The Jury were call'd: *Timon van Bursert*.

Mr. Sol. Gen. I challenge him for the King.

Mr. *Emot*. You must shew Cause.

560.

Mr. Sol. If there be not enough on the Pannel.

After several were challeng'd, for the Prisoner, or the King, at length a Jury were sworn, one of them being an Alien; two no Freeholders; Jury-man at and the rest of *Dutch* Extraction, and very ignorant of the *English* Language.

Mr. Solicitor General having opened the Matter, call'd his Witnesses; and

Samuel Clows was sworn.

Sam. Clows. About a Fortnight before Col. *Clows* Evidence of the
Bayard's Commitment, I came to his House about some Business, and Col. *Bayard* ask'd me if I signing the
 had seen the Addresses, and shew'd me three Ad- Address.
 dresses; the first to my Lord *Cornbury*, to congratulate His Lordship on his coming to the Government; which after he had read, he ask'd me if I had any thing to say against it? I answer'd, No: And sign'd it: The other two Addresses were, one to the King, and the other to the House of Commons, or to the Parliament; which I then observ'd contain'd nearly the same Things: And in one, or both of them to the best of my Remembrance, were contained these things: The Persons addressing call'd themselves *Englishmen*, and others, who tho' Foreigners, were yet entitled to the Privileges of *Englishmen* here: It speaks concerning the Revolution here; and afterwards concerning my Lord *Bellamont's* Administration, in several Articles, of which I remember

ber but one, which is, That the *Hottest* and *Ignorantest* of the People were put into Places of Trust: It speaks of the late General Assembly, and says, That after they had chosen a Speaker, some of the Representatives were inform'd that he was an Alien: Upon which they mov'd that it might be enquir'd into; that the Motion being refus'd, one half of the Representatives, or ten of them left the House; notwithstanding, the remaining part of the Representatives, with some others they took in, did proceed to make Acts; in one of which, they gave a Sum of Money to the Lieutenant Governor, to tempt him to pass these Acts; and likewise a Sum to the Chief Justice of this Province, to find Law and Form for their Proceedings; and that these things tended to the rendring the Government *Vile and Cheap* in the Eyes of the People. I told Col. Bayard, they contain'd things done before my Time, and therefore I did not think proper to sign them.

Col. Bayard. Did I ever ask you to sign them?

Clows. No.

Mr. Nicoll. Do you remember the Word *Oppression* in the Address? Or that the Assembly was call'd an *unlawful Assembly*?

Clows. No.

Peter Odyre, a Frenchman, sworn, and Mr. Briesack to be his Interpreter.

Odyre's Evidence.

Odyre. As I was going by Col. Bayard's House, one Bodinot desir'd me to step in, and sign an Address to the King: I saw the Addresses lying on a Table, and the Colonel said it was for the Good of the Country, but I might sign them or let them alone; and then went away.

W. Richardson sworn.

Richardson.

Richardson. One Day I was desir'd to go to the Coffee-house, where I saw near a Hundred People, and coming up Stairs, I saw Papers on the Table, which were call'd Addresses, and which I sign'd, with others: I saw Col. Bayard there, but he seem'd to be no more acting or concern'd than another. I did not read any of the Papers, but was

was told they were Addresses to the King, my Lord Cornbury and the Parliament; and I think one of them complain'd that the People lay under some Hardships here.

John Bashford sworn.

Bashford. I was at the Coffee-house, and sign'd *Bashford.* four or five Papers, but don't know what they contain'd: Col. Bayard was there, with others, but I did not see his Name to them.

N. B. The five Papers were the three Addresses, 562. and the two Duplicates.

Michael Christian sworn.

Christian. I was at the Coffee-house about *Christ-Christian.* mas, with many other People; I found three Addresses there sign'd by them all, the Substance I have forgot: I don't remember any thing in them either of the Soldiers or their Pay: I remember Colonel Bayard was there.

Mr. Hugh Gray sworn.

Gray. About December last, I met one Mr. Scot, *Gray.* at the Coffee-house, who desir'd me to go into the Upper-Room; I saw some Papers on the Table, which I understood were Addresses to the King, Parliament, and Lord Cornbury: Col. Bayard was there, but I don't remember who ask'd me to sign them; I believe there might be about ten Hands to the Paper: I read all the Addresses, but cannot now remember the Contents of them.

Mrs. Hannah Hutchins sworn.

Mrs. Hutchins. About Christmas last, Col. Bayard brought some Papers to my House, and left them there, but did not stay: He bid me show them my Husband, who was then at Church; the Papers remain'd at my House about three Days, and then I deliver'd them to a Negro, who was sent for them. Col. Bayard was not at our House while the Papers lay there.

John Read sworn.

Read. On the 26th of December, being at Mr. Read. *Hutchins's,* I saw some Papers, which one *Burroughs* asked me to sign, telling me they were Addres-

Addressess: I sign'd them, and saw, as near as I can judge, 200 other Names to the Papers.

Ed. Marshal sworn.

Marshal.

Marshal. About *Christmas* I saw the Addressess at Mr. *Hutchins's* House, and sign'd them: One was to the King, another to the Parliament, and another to the Lord *Cornbury*, to congratulate him on his Arrival: And there was some Complaint of the Speaker of the Assembly being an Alien.

Lieutenant Buckley.

Buckley.

Buckley. I saw the Address at Mr. *Hutchins's*, who ask'd me to sign them; but I refus'd, because none of my elder Officers had done it.

Button was sworn.

Button 563.

Button. Hearing, by some of my Fellow-Soldiers, of the Addressess at Capt. *Hutchins's*, I went thither, and sign'd them all five.

Garnet sworn.

Garnet.

Garnet. A great many of the Soldiers of the *Garison* sign'd; and they expected thereby to be made Free of the City, many of them being Tradesmen.

Flemming sworn.

Flemming.

Flemming. I saw some Rolls at Mr. *Hutchins's* House, to which I put my Name; and also put down two or three Names for others, at their Request, they having first put their Marks: I and the others expected by this to be made Free of the City: I believe out of an hundred and sixty Men belonging to the Fort, about thirty sign'd.

Cherman, Crannel, Griggs, and Bovell depos'd to the same Effect.

Mr. Sol. Here is a Paper sign'd by the Prisoner, I desire the Clerk of the Council may be sworn to prove it.

Col. Bayard. I own that Paper, it is a Petition to the Lieutenant Governor and Council, in Behalf of Alderman *Hutchins*, then in Prison; owning with Mr. *French*, Mr. *Wenham*, and Mr. *Van Dam*, that the Copies of the three Addressess were in our Hands.

Then

Then the Petition was read, and the Act of Assembly on which the *Mittimus* was grounded: And after that, the Commission to the Lord Bel-
lamont at large, and the Lieutenant Governor's Commission.

Mr. Sol. Gen. I have now prov'd those false and scandalous Libels set forth in the Indictment, whereby the Peace of the Government has been disturb'd; which by this Act of Assembly is High Treason: I have likewise prov'd, That the Soldiers were drawn in to sign those Libels, and that some did sign Blank Rolls, which was Lifting of Soldiery, and is Treason.

The Council for the Prisoner proceeded to his Defence, and observed, That the Indictment does not charge him with any Fact, (except his own signing the said Libels,) but for Endeavours: That it was not alledg'd, That the Peace of the Government was disturb'd; or that any Mutiny hath been among the Soldiers; or that any one of His Majesty's Subjects hath cast off his Obedience to His Majesty's Government.

That if it were admitted the signing of the said Addresses were a Crime, the Evidence was very lame, for it did not appear, that those Addresses sign'd at the Coffee-house were the same Addresses that were at Col. *Bayard's*; or that the Addresses at Alderman *Hutchins's* were the same with either: But they insist further, That it was the Right of the Subject to petition the King; and if so, then to procure Men to do it could be no Crime.

Just. Atwood. I do not say petitioning the King is a Crime, but it may be to petition the House of Commons, in the Plantations, where the King Governs by his Prerogative.

The Council for the Prisoner insisted, that it was every Day's Practice, as appear'd by the Votes every Sessions, where might be found Addresses, Petitions and Complaints, from the Plantations: That if the Subjects of the Plantations might not petition their Prince, they were in a worse Condition than Slaves, and that the late

Statute

Statute to check the exorbitant Actions of Governours in the Plantations, and make them accountable in *England*, for their Miscarriages Abroad, would be rendred ineffectual, if the Subject might not petition when aggriev'd.

An Act of Assembly cannot create new Treasons.

565. That this Indictment is founded on an Act of Assembly in this Province, which has not made, or can make any new Treason: It only recognizes the King and Queen; and enacts, That those who shall do any thing destructive to the Establishment, by Force of Arms, or otherwise, shall be Rebels and Traitors, which they would be without this Act: That indeed if this Address and Petition had been to the *French* King, the Thing might have been Treason; but in this Case there was no Colour for making it so.

566. The Prisoner's Council further insinuated to Juries to take the Jury, That they were Judges as well of Matter of Law, as Matter of Fact, otherwise an innocent Action if disguised in the Indictment with the Name of Treason, and prov'd to the Jury, they would be oblig'd, to find the Prisoner guilty of High Treason: That upon Indictments of Murder, the Jury are plainly Judges of Law as well as Fact; for they do not only find the Party Guilty, or Not Guilty in general, but bring him in guilty of Murder, Manslaughter, or Misadventure, &c.

567. And from hence they infer, that altho' they shou'd believe the Prisoner to have done the Facts laid in the Indictment, they might nevertheless acquit him.

The Prisoner call'd Mr. *Veasy*, the Minister of *New York*, and others, to testify as to his Character and Affection to the Government.

Justice *Atwood* refus'd to admit one *Jamison* as an Evidence, because he had sign'd the Addresses.

J. Atwood's Dis-
fections to the
Jury.

Justice *Atwood*, in his Charge to the Jury, admitted that the Prisoner was not Indicted on the 25 *Edw. 3.* but upon an Act of Assembly of this Province, confirm'd by His Majesty, who had Power to enact what Offences shou'd be deem'd High Treason, as well as the Parliament of *England*: That by this Act of Assembly it was High Treason

Treason by any Means to disturb the Peace and Quiet of the Government, as it is here establish'd: That the signing these Libels were Overt Acts of such a Disturbance; and further, That the drawing in Soldiers to sign Complaints against their Officers, was Treason at Common Law: And from the whole, he concluded, That the Facts had been well prov'd, and that those Facts did amount to High Treason, within the Words and Meaning of the said Act of Assembly, and that therefore the Jury ought to find the Prisoner Guilty. And the Jury not being able to agree that Day, the Court adjourn'd to *Monday* the 9th of *March*, when the Jury came into Court, and desired some further Directions, they differing about some Evidence that had been given.

Justice *Atwood* said, He had receiv'd Letters from the Jury, and answer'd them, and took this Opportunity to acquaint the Jury, That if they doubted whether the Facts that had been proved were Treason, they might, however, find the Prisoner Guilty: For he might move in Arrest of Judgment, and be reliev'd, as to Matter of Law. 568.

The Council for the Prisoner alledg'd, That it was not fair to give the Jury a Handle to find the Prisoner Guilty in Expectation of Relief in Arrest of Judgment; and insisted, that the Jury were Judges of the Law as well as Fact: And that if they wou'd enslave themselves and their Posterity, and debar themselves of all Access to their Prince, they wou'd be in a worse Condition than Negroes.

The Court adjourn'd till three a Clock, when the Jury brought the Prisoner in Guilty.

The Council mov'd for Time to move in Arrest of Judgment: And they were order'd to be ready at Eleven next Morning. Prisoner move in arrest of Judgment.

Council for the Prisoner. It does not appear, There were that any one Overt Act alledg'd in the Indictment not two Witnesses. has been prov'd by two Witnesses, as by the 7 W. 3. ought to be done.

Just. *Atwood*. The Jury are the sole Judges of the

the Evidence, and if there has been any Omission in that, it is now help'd by the Verdict. Council. Admitting the Overt Acts laid in the Indictment have been prov'd, they cannot amount to High Treason: The Words of the Act of Assembly are, *That if any Persons shall endeavour, by Force of Arms, or otherwise, to disturb the Peace, Good, and Quiet of the Government, they shall be deemed Rebels and Traitors.* Now if the Word *otherwise*, as Mr. Solicitor insinuates, should bring the Prisoner within the Meaning of the Act of Assembly, then every Breach of the Peace, sudden Quarrel, or small Battery, shall be deem'd Treason. Besides, here in the Plantations, we are not capable, in our Assemblies, to make and declare any new Species of Treason, than what is comprehended in the 25 Ed. 3. or some subsequent Statute. The Council further offer'd in Arrest of Judgment,

569. *First*, That two of the Jury were Aliens. *Secondly*, That the Precept to summon the Jury was ill awarded; or rather, not awarded at all. *Thirdly*, That the said Precept was not return'd and indors'd by the Sheriff, pursuant to the 12 Edw. 2. c. 35.

That the Jury were Aliens. 570. But the Court over-rul'd all their Exceptions: As to some of the Jury being Aliens, the Court said, Tho' this might have been a good Exception for Cause before the Jury had been sworn, yet now it was too late.

571. That as to the Precept, being misawarded, it being directed to the Sheriff to summon eighty Men of his Bailywick, he being Sheriff as well of the County as City of *New-York*, and the Fact in the Indictment alledg'd to be done in the Dock-ward of the City. It was admitted this would have been a good Exception, in Case the Sheriff had summon'd the Jury by vertue of a Writ; but not when he does it by Precept, under the Hand of the Commissioners: And the same was said as to the third Exception, That the Precept was not return'd and indors'd by the Sheriff.

The *Venire*, ill awarded.

The Precept not well return'd.

And

And the Commissioners on the Bench severally deliver'd their Opinions, That the Reasons offer'd were not sufficient to arrest Judgment. Then the Prisoner was ask'd if he had any more to say why Sentence shou'd not pass, and answering, No: Sentence was pronounc'd against him as a Traitor.

Also Alderman *Hutchins* was afterwards Tried and Attainted for the same Treason.

*The Trial of WILLIAM FULLER,
the 20th of May, 1 Annæ 1702.*

The Queen against William Fuller, upon an Information for making and publishing scandalous Libels.

THE Information sets forth, That the Defendant being an Impostor and a common Liar, and maliciously contriving and intending the late King *William* and his Subjects to delude and deceive, and Discords between the said late King and his Peers, and other great Officers and Subjects, to excite and stir up; and to bring the said Peers, great Officers and Subjects, into Hatred and Contempt with the said late King; and in order fraudulently to obtain great Sums of Money of the said late King, he the said *William Fuller*, the first Day of *January*, in the 13th Year of the said late King, atw
in order to effect his said wicked Practices and Intentions, did falsely, maliciously and scandalously write and print, a false, scandalous, and defamatory Libel, entitled, *Original Letters of the late King's* (meaning the late King *James*) and others, to his greatest Friends in England; with the Depositions of *Thomas Jones*, and *Thomas Widrington*, Esquires, proving the Corruption lately practis'd to ruin this Nation. In which false, feign'd, and scandalous Libel, among
other

other Things are contained, &c. then the Information sets forth the several obnoxious Expressions, which are mentioned hereafter in the Evidence.

574. The Information further sets forth, That the Defendant, the Day and Year above said, in order to effect his other wicked Practices and Intentions against divers Officers and other Subjects of the said late King, upon a feign'd and pretended Correspondence between them and the late King *James*, while he resided in *France*; did frame and publish another false and scandalous Second Book. Libel, entitled, *Twenty six Depositions of Persons of Quality and Worth*. In which said scandalous Libel are contained the following Expressions, viz. *Mr. Jones has also made Oath, that he paid 5000 l. more by the late King's Order, to several Persons in Places of Trust, to compleat my Ruin, and invalidate me for ever. Nor is this all, for the same Jones will prove by undeniable Witness and Demonstration, that he has distributed more than 180000 l. in eight Years last past, by the French King's Order, to Persons in publick Trust in this Kingdom.* Whereas in Truth the said *Thomas Jones* did not depose upon his Oath as is contain'd in the said scandalous Libel, but the said Libels were false and feigned; to the great Scandal and Abuse of the said late King and his Ministers, &c. to the evil Example of others, against the Peace, &c. Not Guilty pleaded, and Issue thereon.

The Evidence open'd.

The Queen's Council in opening the Evidence took notice, That in the Year 1691, the Defendant *Fuller* was censur'd by the House of Commons, prosecuted, convicted and punish'd, for those very Crimes he was now Tried for, and that notwithstanding he still persisted in these villanous Practices.

That about Years since, he apply'd himself to the chief Ministers at Court, and insinuated, what Discoveries he cou'd make, relating to the Cheat of the Birth of the Prince of *Wales*, and of great Sums of Money receiv'd by several Persons of Quality here, from the late King *James* and

and the *French King, &c.* but not meeting with Encouragement, he then undertook to publish the abovesaid scandalous Libels, and petition'd the House of Peers that he might be heard to make out the Truth of them: The Peers appointed a Day for him to produce those Persons he mention'd, to make good his Accusations and Charge, which he undertook to do; but failing from Time to Time, their Lordships order'd him to be committed and prosecuted for an Impostor. But the Defendant being a hardned Rogue, was not humbled by this Order, but immediately thereon applied himself by Letters to the Speaker of the House of Commons, alledging the same Matters as he had done before the Lords. The Commons order'd him to be brought to the Bar, where he desir'd only ten Days Time to produce those Persons mention'd in his Libels, and (to leave him without Excuse) they granted him a Fortnight, but having trifled with the Commons, as he had done with the Lords, they voted him an incorrigible Rogue, and order'd him to be prosecuted.

The Matter being opened, the Queen's Council proceeded to the Evidence.

Then Fuller's Book was produced, and Mr. Buck

sworn.

Mr. Buck. Mr. Fuller brought this Book to me in MSS. he said he took these Depositions out of the Secretaries Office, and desir'd me to print it; and said, it had done the King 10000 l. Damage, because it was not done sooner.

Mr. Fuller. My Lord, I will not give these Gentlemen the Trouble to prove it; I own this Book, and the other, entitled, *Original Letters from the late King James, &c. publish'd by Command.*

L. C. J. Holt. Mr. Fuller's Order is a Command, it seems.

Some Paragraphs in the first Libel were read.

Page 1. Thomas Jones, Esq; deposeth, That he being at St. Germans, the Court of the late King James, in January 1692, the said late King being in his Closet, sent for this Deponent, and there com-

The Books
produc'd.

Mr. Buck
sworn.

Fuller own'd
them to be
his.

Books.

manded the said Deponent to begin his Journey for England, in Company with Colonel Thomas Da la Val, and Mr. George Hayes, and the said late King did then and there deliver to this Deponent several Letters and Papers to divers Noblemen, and others, in England, to whom this Deponent hath several times before and since brought Letters from the late King and his Queen, and pretended Secretaries of State, and deliver'd them according to Order: And further, that the said late King James, at the Time aforesaid, did deliver to this Deponent a Paper, being an Order for this Deponent to receive 6000 l. which was to pay to several Persons in Trust, then in England, to engage them to invalidate the Evidence of William Fuller, (who had been employ'd by the late King James, as the said late King then said, in his most secret and weighty Concerns, since his coming into France.) Page 7. And this Deponent saith, He inform'd Mr. Fuller that Da la val and Hayes were come to Town, and lodg'd at an Apothecary's in Holbourn, &c.

The Libel goes on, and specifies several Sums given to Members of Parliament, and other great Men.

356. Mr. Att. Gen. We have prov'd his publishing the Books. We will now hear what he can say for himself.

L. C. J. Holt. Can you make it appear these Books are true?

Fuller's Defence.

W. Fuller. I hope I shall: I have no Witnesses at present; but if Your Lordship will grant your Warrant for Jones, I'll forfeit my Life if he don't come.

L. C. J. You might have had Subpœna's for your Witnesses against this Day.

W. Fuller. I endeavour'd it, but I had not Money to bear their Charges.

L. C. J. You made the same Excuse before the Lords and Commons: If you have any Witnesses produce them.

W. Fuller. My Lord, I presume you cannot but remember, that in Crone's Case I behaved my self honourably,

honourably, and was own'd to have done the Nation good Service.

L. C. J. That was formerly, and signifies nothing to what you do now: You charge a great many Persons with corresponding with *France*; you say Mr. *Jones* will prove by undeniable Demonstration, that he distributed more than 180000 *l.* by the *French King's* Order, to several Persons employ'd in the Government, and produce no Proof of it; and you say, *I had the Original of this from Mr. Jones, &c.* Where are they?

W. Fuller. By his own Confession he has been guilty of High Treason, and therefore will not appear without a Warrant.

L. C. J. You cannot pretend to a Right to my Warrant.

W. Fuller. If Your Lordship please to give me leave to say something in my Defence: When I had printed this Book, I was summon'd before the Lords, and after that was committed to the Fleet; my Friends were all call'd before the Lords, and by my Lord *Jafferries* and other Lords, there were such Questions ask'd as I believe were never ask'd before.

L. C. J. This is not to be endured; you do but aggravate your Crime: If you can offer any Matter to prove what you have writ, let us hear it: Where is *Jones*? Where did he make this Confession, and before whom? 577.

W. Fuller. *Jones* is in *Hampshire*; I can't tell before whom he made it, but if Your Lordship please to give me your Warrant I will produce him.

L. C. J. Shall I make a Bargain with you? Why have you not produc'd him all this while, before the House of Lords, and the House of Commons?

W. Fuller. My Lord, I cannot force him, I was with the Secretary of State, and told him *Jones* will not come in voluntarily. If the Lords will grant a Warrant he may be brought; I offer'd this to the House of Commons too, but it was not granted.

The TRIAL of

Mr. Serj. Darnel. The Secretary of State sent one or two for him.

W. Fuller. He sent no Body.

Chief Justice L. C. J. Holt. Gentlemen of the Jury, You directs the Jury. hear what the Purpose of this Information is, you hear how it is prov'd, he owns he is the Publisher of them, and if you believe he did so, you are to find him Guilty.

He is Convicted. The Jury found him Guilty, without going from the Bar.

*The Trial of Col. RICHARD KIRBY,
Capt. JOHN CONSTABLE,
Capt. COOPER WADE, Capt.
SAMUEL VINCENT, and Capt.
CHRISTOPHER FOGG, at a
Court-Marshal on Board the Bre-
dah, in Port-Royal Harbour in
Jamaica, on the 8th, 9th, 10th,
and 12th Days of October,
1 Anne 1702.*

Charge exhib-
ited against
Col. Kirby.

578. **C**olonel Richard Kirby, Commander of the *Defiance*, was Tried on a Complaint exhibited by the Judge Advocate, of Cowardice, Neglect of Duty, Breach of Orders, and other Crimes committed by him in a Sea-fight, begun the 10th of *August*, 1702, off of *St. Martha*, in the Latitude of ten Degrees North, near the main Land of *America*, between the Honourable *John Bembow*, Esq; Vice Admiral, on Board the *Bredah*, and six others of Her Majesty's Ship, and Monsieur *Du Cass*, with four French Ships of War: Which Fight continu'd till the 24th of *August*.
The

The Witnesses sworn on Behalf of the Queen, were, the Honourable *John Bembow*, Esq; Admiral, two Captains, eight Lieutenants, five Masters, and five inferior Officers.

They deposed, That the Signal of Battle being out, the 15th of *August* at Three in the After-noon, the said Col. *Kirby* having the Van, the Admiral was forc'd to send his Boat on Board of him, and command his making more Sail, and get abreast of the Enemy's Van: That the Fight began about Four, and that *Kirby* did not fire above three Broad-sides, and then luff'd out of the Line, and out of Gunshot, leaving the Admiral engag'd with two *French* Ships till it was dark. The Evidence against him.

That the 20th, at Day-light, the Admiral, and *Ruby*, *George Walton* Commander, were within Shot of all the Enemy's Ships, but Col. *Kirby* was three or four Miles a stern: Then the Admiral made a new Line, and took the Van himself, with a Command to the said *Kirby*, to keep his Line, which he promised to do, but did not, keeping two or three Miles a stern.

That the 21st, at Day-light, the Admiral was on the Quarter of the second Ship of the Enemy, and the *Ruby* on the side, very near, and the *Ruby* was so much disabled, that she was forc'd to be tow'd off: That this Action lasted two Hours, during which Time *Kirby* lay a Broad-side of the sternmost Ship; and the Admiral commanded him twice to ply his Broad-sides, but he fir'd not a Gun; and threatned to run the Boatswain through with his Sword, when he repeated the Admiral's Orders to him: And that, had the said *Kirby* and *Constable* done their Duty, they must have taken or destroy'd the said *French* Ships.

That the Admiral continued the Chase all Night, and that the 22d in the Morning, *Kirby*, with the rest of the Ships, (except the *Falmouth*) was three or four Miles a stern, and never came up; as if they had a Design to sacrifice the Admiral to the Enemy: That by this means a *Flemish* Ship

Ship in Monsieur *Du Cass*'s Company, on Board which was all the *French* and *Spanish* new Governours, and other Officers, made her Escape.

That the 23d the Admiral and *Falmouth* continued the Pursuit, but *Kirby* and the rest were three or four Miles a stern.

That the 24th, about Two in the Morning, the Admiral and *Falmouth* came up with the sternmost of the Enemy, but *Kirby* and the rest were three or four Miles a stern: That afterwards *Kirby* being pretty near the said sternmost Ship of the Enemy, fir'd about twelve Guns at her, but fearing a Return from her, run away, altho' she was near disabled, and the other Ships follow'd him: That the other three *French* Ships seeing the Cowardice of the *English*, although they were three or four Miles Distance, bore down upon the Admiral, and rescued the said disabled Ship: That this Day the Admiral's Leg was broke, who notwithstanding commanded the Fight to be vigorously continued, and sent to all the Captains to keep their Line, and behave themselves like *Englishmen*: That upon this, *Kirby* came on Board the Admiral, and dissuaded him from Fighting, and drew up a Paper of his Reasons for not Fighting, which he procured the rest of the Captains to sign: And that during the Fight he dodged behind the Mizzen-Mast and discouraged his Men: And that he amended the Master's Journal of the Fight according to his own Inclinations.

579.

Kirby's Defence.

Colonel *Kirby* deny'd the whole Charge, except his signing the abovesaid Writing, and brought several Witnesses to his Behaviour during the Action; but they said little to the Purpose: And Col. *Kirby* being ask'd, Why he did not Fire at the Enemy's sternmost Ship which lay point blank with him the 21st of *August*? He reply'd, Because they did not fire at him, for that they had a Respect for him. Which Words he repeated three several Times during his Trial.

Sentenc'd to be shot.

Upon due Consideration of the Premises, and of the great Advantages the *English* had in Number of Ships, being seven to four, and of Guns 122 more

more than the Enemy. The Court was of Opinion that he fell under the 11th, 12th, 14th, and 20th Articles of War; and adjudg'd accordingly, That he be shot to Death: But further decreed, That his Execution should be respited till Her Majesty's Pleasure were known.

Captain John Constable, Commander of the Wind-Charge against Tor, was also Try'd, for Breach of Orders, Neglect of Duty, &c. during the Fight. *Capt. Constable.*

THE Witnesses depos'd, That Capt. Constable Evidence a- never kept his first or second Line of Battle, gainst him, but acted in all Things as Col. Kirby had done; to the Disservice of Her Majesty, &c. And that he was drunk during the Fight.

He call'd several Witnesses to his Behaviour, 580. who all declared he kept the Quarter-Deck during His Defence: the Engagement, and encourag'd his Men to fight: That the Message sent him by the Admiral was misunderstood by himself and several of his Men: And he pray'd the Mercy of the Court.

The Court were of Opinion, that Capt. John Sentenc'd to Constable fell under the 12th, 14th, and 20th Ar- be Cashier'd. ticles of War, and adjudg'd him to be immediately Cashier'd, and rendred incapable of serving Her Majesty, and be imprison'd during Her Majesty's Pleasure; and sent to England in the first Ship.

Captain Cooper Wade, Commander of the Green-Charge against wich, was Try'd for Cowardice, Breach of Orders, Capt. Wade. Neglect of Duty, &c. during the said Fight.

THE Witnesses depos'd, That he never kept Evidence a- the Line of Battle, fir'd all his Shot in vain, gainst him, not reaching half way to the Enemy; that his Officers telling him of it, he commanded them to fire, saying, The Admiral wou'd not believe they fought, if they did not continue the Fire: That his Ship receiv'd but one Shot; and that he was drunk during the greatest part of the Action; That he sign'd the afore said Paper, &c. and during

during the Fight arraign'd the Courage and Conduct of the Admiral.

His Defence.

He deny'd the Charge, call'd some Witnesses, who said little in his Behalf; and then begg'd the Mercy of the Court.

Sentenc'd to be shot.

The Court was of Opinion that the said *Cooper Wade* fell under the 11th, 12th, 14th, and 20th Articles of War, and adjudg'd him to be shot to Death: But respited his Execution, till Her Majesty's Pleasure were known.

Charge against Capt. Vincent, and Capt. Fogg,

Captain Samuel Vincent, Commander of the Fal-mouth, and Captain Christopher Fogg, Commander of the Bredah, (the Admiral) were Try'd for signing the abovesaid Paper against Fighting.

Their Defence.

They acknowledg'd the signing of the said Paper: And alledg'd in their Excuse, That being deserted in each Day's Engagement by the rest of the Fleet, they had reason to apprehend their being taken by the Enemy: And Admiral *Bembow* coming into Court, declared, That during the six Days Fight, the said *Capt. Fogg* behav'd himself with great Courage and Conduct: And that *Capt. Vincent* behav'd himself valiantly, and desir'd leave to come to the Admiral's Assistance, then engaged with the Enemy, and deserted by all the rest of the said Ships; which he did, to the Relief of the said Admiral, who otherwise had fallen into the Hands of *Monsieur Du Cassé*.

Adjudg'd that they be suspended.

The Court being of Opinion, that the signing of the aforesaid Paper brought them under the Censure of the 20th Article of War, adjudged *Capt. Samuel Vincent*, and *Capt. Christopher Fogg*, to be suspended: But the Execution thereof was respited till His Royal Highness Prince George of Denmark, Lord High Admiral of England, &c. his Pleasure be known.

Capt. Hudson died on Board.

Capt. Thomas Hudson, Commander of the Pennennis, died on Board his said Ship, in the Harbour of Port-Royal, in Jamaica.

The Trial of HAAGEN SWENDSEN, SARAH BAYNTON, JOHN HARTWELL, and JOHN SPURR, at the Queen's-Bench Bar, the 25th of Novemb. 1 Anne 1702.

THE Prisoners were Arraign'd at the *Queen's-Bench Bar*, on *Friday* the 20th of *Novemb.* and severally pleaded, *Not Guilty.* And the Court appointed the Trial on *Wednesday* the 25th.

Mr. *Swendson* mov'd for a longer Time, alledg- ing that a material Witness for him was gone in- to *Yorkshire*; the Court said, If any Person wou'd swear it, they wou'd put off the Trial; but no Oath being made, the Trial came on, on the Day appointed, before the Lord Chief Justice *Holt*, Sir *John Powel*, Sir *Littleton Powis*, and Sir *Henry Gould*. Motion to put off the Trial for want of a Witness.

Haagen Swendsen was first Tried, and being a Foreigner, the Jury were half Foreigners, and half Natives.

The Indictment sets forth, That one *Pleasant Rawlins*, Gentlewoman, being a Virgin, and unmarried, Granddaughter and Heir of *William Rawlins, Sen.* deceas'd, and Daughter and Heir of *William Rawlins, Jun.* deceas'd, and being above the Age of Sixteen Years, and under the Age of Eighteen, and having Substance and Estate, in Moveables, and in Lands and Tenements, viz. in Money, Goods, and Chattels, to the Value of 2000 *l.* and in Lands and Tenements to the Value of 20 *l. per ann.* to her, and the Heirs of her Body: The said Defendant, together with one *Thomas Holt*, on the 6th Day of *November*, 1702, at the Parish of *St. Giles's in the Fields*, in the County of *Middlesex*, for the Lucre of the E- state

state and Substance of the said *Pleasant Rawlins*, did unlawfully, feloniously, and violently, and against the Will of the said *Pleasant Rawlins*, take and carry her away, with an Intent to Marry her to the said *Haagen Swendsen*: And that the said *Haagen Swendsen* being a Man of a dishonest Conversation, and of none or very little Estate or Substance, then and there, by the Help and Procurement of the other Defendants, did feloniously Marry the said *Pleasant Rawlins*, and then and there did carnally know her: And that the said *Thomas Holt*, the Day and Year abovesaid, did knowingly and feloniously receive the said *Pleasant Rawlins*, and also the said *Haagen Swendsen*, and did incite, aid, and abett the said *Haagen Swendsen*, with the said *Pleasant Rawlins*, to he and her carnally to know, &c. to the Displeasure of God, the Disparagement of the said *Pleasant Rawlins*, the Grief of her Friends, and against the Queen's Peace, &c.

582.
Haag. Swend-
son's Trial be-
gins.

583:
Mr. Busby's E-
vidence.

Mr. Solicitor General having opened the Nature of the Evidence, Mr. *William Busby* was call'd, and sworn.

Mr. *Busby*. Mrs. *Pleasant Rawlins* is the Daughter of *William Rawlins*, deceas'd, who left his Estate to Dr. *Bright* and my self, to be sold, for Payment of his Debts and Legacies, and left the Surplusage to his Daughter, which is about 2000*l*. She has also about 20*l*. per ann. in Land: She is near Eighteen Years of Age, and was never Married.

Mrs. Nightin-
gale's Evi-
dence.

Mrs. *Nightingale* was sworn.
Mrs. *Nightingale*. Mrs. *Pleasant Rawlins*, and Mrs. *Busby* have lodg'd at my House above three Years; and one Day Mrs. *St. John* came to me, and ask'd me if I took Boarders? I told her, I wou'd take none but the Ladies I had: She said she had an Acquaintance, a Widow-Lady, coming out of *Wiltshire*, about a Suit of Law, and wou'd be in a sober Family, near a Church: However, I deny'd her, and expected to hear no more of her, but about a Month after, she came again, and said the Lady was come to Town, (which

(which was this Mrs. Baynton) I ask'd if she knew her? She said, Yes; she was very intimate in the Family. I enquir'd of another, who liv'd in the *Mews*, if he knew Mrs. Baynton? He said, Yes; and she came of a very good Family: At length, I consented she should come; and she made a very modest Appearance, in her Behaviour and Garb: We agreed for her Board, and she was to come on the *Wednesday* following; which she did, with her Maid, a modest Girl, and a Neighbour, which gave me the more Encouragement; she carried her self very well, till *Michaelmas Day* at Night, when we heard of her new Brother; she seem'd elevated at the News, and fell into Convulsion-Fits, which I believ'd real. She said she had a dear Brother, a good Christian, and he wou'd come on the *Morrow*. When he came, he brought two Gentlewomen with him, very modest, which I never saw before or since; Mrs. Baynton told her Brother, before me, what good Lodgings she had, and wish'd he wou'd come and lodge near them; she ask'd me what I wou'd have a Meal, if her Brother shou'd come at any Time? I said, Twelve-pence. And on *Friday* he came: I went to Church, and left them together at Cribbage, as I found them at my Return: Mrs. Baynton said she had an Interest in a *Norway Ship*, and invited us to go on Board of it; which we did, the *Saturday* after *Michaelmas*, about eight of us; among whom were Mrs. Rawlins, Mrs. Busby, and Mr. Swendsen.

L. C. J. Holt. Is this Mrs. Baynton's Brother?

Mrs. Night. He went for her Brother.

L. C. J. Whereabouts is your House?

Mrs. Night. In *Tuttle-Fields*.

Mr. Soll. Gen. This Mrs. Baynton came to you under the Character of a Country-Lady, on a Law-Suit: Do you understand she was so?

Mrs. Night. I enquir'd of several Persons, who acquainted me that the Bayntons liv'd in *Wiltshire*; but it was not long before we began to suspect her, for there seem'd to be an extraordinary Love between her and Swendsen, more than is usual between

tween Brother and Sister, and I gave notice of it to my Family, and designed to have given her Warning, but she prevented me, by saying her Affairs permitted her going into the Country, and so she design'd to return, when her Month was up.

L. C. J. Was she gone from your House before this Thing happened?

Mrs. Nighbt. No, my Lord, she said there was a Fellow come to Town, she was afraid wou'd cheat her, and she must take out a Statute of Bankrupt against him: Which wou'd occasion her Stay a Week longer.

Mr. Raymond. Did you ever observe they were together in private?

Mrs. Nighbt. No: We never had any Suspicion of Mr. Swendsen, but of the Woman; for she cou'd put on all manner of Disguises.

Mrs. Busby was sworn.

*Mrs. Busby's
Evidence.*

Mr. Busby. My Brother *Busby* was one of *Mrs. Rawlins's* Guardians, and put her under the Care of my Husband, four Years ago this *Christmas*: We liv'd in *Stretton-Grounds* till my Husband died, which is three Years last *July*, and then I left off House-keeping, and went and liv'd at *Mrs. Nighbt's*, where we have continued ever since: And *Mrs. Baynton* lately came and lodg'd there; the Day after *Michaelmas* Day, *Mr. Swendsen* came to see her, who she said was her Brother; afterwards *Mr. Swendsen* came several times to her, and went for her Sister's Husband; and she agreed with *Mrs. Nighbt*, that he might dine with her sometimes, at Twelve-pence a Meal: He din'd there nine or ten Times, but I don't know that ever he and *Mrs. Rawlins* were ever in private: As to *Mrs. Baynton*, we thought very well of her, till at last we discern'd too much Freedom between *Mr. Swendsen* and her, we suspected her Virtue, and thought she wou'd drink, and were inform'd she wou'd swear: Her Maid told her of the Strangeness of the Family, she said, They had best be civil, or she wou'd stay and plague them. She told *Mrs. Nighbt*, at length,

length, the Town was chargeable, and her Business done, and she wou'd return into the Country.

Mr. Soll. Gen. What do you know concerning Mrs. *Rawlins's* being taken away?

Mrs. Busby. Mrs. *Baynton* knowing it was our Custom to go to *Oxenden Chappel* every Friday Morning; she said she was going to *Golden-Square*, and wou'd take us in her Coach, and set us down near the Chappel: When we came to *Dartmouth-street*, some Body bid the Coach stop. While I was looking out, I heard Mrs. *Baynton* cry out to the Coachman, Drive on: And of a sudden I saw a Man in the Coach, which was *Hartwell* the Bailiff, *Hartwell* had his Arms about Mrs. *Rawlins's* Side, and said, 'Tis this Lady and you, I am concern'd about; He carried us all to the *Star and Garter* in *Drury-Lane*; I press'd him to let us go to *Fleetstreet*, for I had Friends there; *Hartwell* was very angry, and wou'd hear nothing of it: When we were in the Room at the Tavern, Mrs. *Baynton* hastned out of the Room, pretending to go for Friends, Mrs. *Rawlins* and I were in a great Consternation, I took hold of her Arm, and said, I wou'd live and die with her, but the Bailiffs came in, and took her by Violence from me: They said she was Arrested by a Writ out of one Court, and I by one out of another; and when she was going, I put my Head out of the Window, and cry'd, Murder. Upon which some Neighbours came in; but being told it was an Arrest, they wou'd not meddle in it. There was a little Boy by, who said he would go any where for me; I sent him for two Gentlemen; who came. The Bailiffs said, They had an Action of 200 l. against me, and were very impudent; but shuffled about a while, and then left me with those Gentlemen, without taking any Bail. The first Time I saw Mrs. *Rawlins* again, was on the *Saturday* in the Afternoon, when they were before the Recorder.

Mr. Mountague. Did Mr. *Swendsen* make any Entertainments? 386.

Mrs.

Mrs. Busby. But once, as I know of.

Prisoner. Did you know of any Love between *Mrs. Rawlins* and me?

Mrs. Busby. No.

Mrs. Baynton's Maid sworn.

Mr. Soll. Gen. Did you know *Mrs. Baynton*?

Mrs. Baynton's Maid's Evidence. *Maid.* Yes: I was recommended to her, by one *Mrs. St. John*, and serv'd her about a Month.

Mr. Soll. Gen. Do you know one *Mr. Swendsen*?

Maid. Yes, my Lord, that is he: My Mistress and he went for Brother and Sister.

Mr. Sol. Gen. How did she behave her self?

Maid. Pretty well; till at last the Family suspected her to be a loose Woman: I went away the Day after *Mrs. Rawlins* was taken away.

Mrs. Berkley sworn.

Mrs. Berkley's Evidence. *Mr. Sol. Gen.* Was you present when the Prisoner was taken up, and do you know if *Mrs. Baynton* be his Sister?

Mrs. Berkley. I being a Neighbour and frequently at the House, went to *Mr. Swendsen* and said, Is this wicked Woman your Sister? He said, No, she is not my Sister; but I have gain'd my End, in making her a Tool to my dear Wife: I'll gratify her for what she has done, and put her away on *Monday*, and never see her more.

Mr. Blake sworn.

Mr. Sol. Gen. Do you know *Mrs. Baynton*, or the Prisoner at the Bar?

Mr. Blake's Evidence. *Mr. Blake.* I have known *Mrs. Baynton* these twelve Years; she is no Country-Lady, but works for her Living: The Prisoner at the Bar, and she, lodg'd at my House six or seven Months; their Rooms were opposite; she went from my House about five or six Weeks before this Matter happened.

L. C. J. Where is your House? What Lodgers had you besides?

Blake. My House is in *Red-Lyon-Street*; I had a Parliament-Man lodg'd with me at the same Time. I saw no Harm by her, while she was with me.

Wakeman

Wakeman sworn.

Mr. Sol. Gen. Were you one of the Bailiffs that arrested Mrs. *Busby*, and Mrs. *Rawlins*?

Wakeman the
Bailiff's Evi-
dence.

987.

Wakeman. On Wednesday before they were arrested, my Daughter told me Mr. *Hartwell* had left a Writ for me to serve: And the next Morning he carried me to the *Mure-Tavern*, and ask'd me to execute it; but one Mr. *Holt* came in and said the Business could not be done that Day; and he bid me call there again the next Morning: I did so; and Mr. *Holt* call'd out Mr. *Hartwell*, and said it cou'd not be done: Afterwards he said it might be done; and Mr. *Hartwell* took me and Mr. *Spurr* with him to *Sixtton-Street*: Mr. *Hartwell* and Mr. *Spurr* went before, and bid me follow the Coach, and at *Dartmouth-Ground*, Mr. *Spurr* stopped the Horses, and Mr. *Hartwell*, I suppose, gave the Word of Arrest, and into the Coach he went, and I rid behind: The Coach was order'd to the *Star and Garter Tavern* in *Drury-Lane*; and when we came there, we went into a Back-Room, and the Gentlewoman with the Band-box said to Mrs. *Rawlins*, I will go to some of your Friends: The Gentlewoman was carried by Mr. *Hartwell* to his House, whither I follow'd them. When I came out from Mr. *Hartwell*'s, Mr. *Holt* call'd me over the Way, and led me to the *Five Bells* in *Witch-street*, where there was a Gentleman, I think it was the Prisoner at the Bar: Afterwards I went to *Hartwell*'s House again, and Mrs. *Hartwell* told me her Husband was gone with the Gentlewoman to the *Vine-Tavern* in *Holbourn*, to make an End of the Matter, thither I went, and found him, and some Company, eating of Steaks, and Mr. *Holt* told me I was discharg'd of my Prisoner: And so I went away.

L. C. J. Was the Gentlewoman at the Tavern then?

Wakeman. There is a Court over against the Tavern, I saw her look out of the Window over the way, as I came through the Court, and this Gentleman look'd out of the Window, but when I

came in I saw him alone, and did not see Mrs. Rawlins in the Tavern.

Council. You said you serv'd a Writ on Mrs. Rawlins, Had you no Process against Mrs. Busby?

Wakeman. No, none at all. I did not keep her, Spurr was employ'd to keep her.

Mrs. Pleasant Rawlins sworn.

588: Mrs. Rawlins. I was in a Coach, going to Oxenden-Chapel, with Mrs. Busby, and Mrs. Baynton; and three Bailiffs came about the Coach, and carried us to the Star and Garter Tavern in Drury-Lane; they forc'd me up Stairs, into a Back-room, but we got into a Forward-room: We had not been there long, before they parted Mrs. Busby and me: Mrs. Baynton was gone for our Friends, as she pretended: I was in a great Fright, and Mrs. Busby saying, We will die together, they took me by Force from her: Hartwell swore a great Oath, and thrust me down Stairs, and forc'd me out of a Back-door, into an Alley; when he went to put me into a Coach, I cry'd out, Murder: Then he threatned to put me into Newgate: He carry'd me to his own House; where Mrs. Baynton came in, pretending she heard my Name as she was going by; she said she wou'd send for her Brother who shou'd Bail me: He came, and we went to the Vine-Tavern in Holbourn, where I was an Hour or two before I heard any thing of Marrying; but after we had din'd, she begg'd of me to have her Brother, and said, If I did not Marry him, I should be ruin'd: I desir'd my Friends might be sent for; but they wou'd not admit of it. She ask'd me to let her see the Ring off my Finger; which I refusing, she forc'd it from me, and said she wou'd go and get a Wedding-Ring made by it: When they brought the Ring, they said to me, Will you be Married, or no? I said I wou'd not, without the Consent of my Friends. They said, if I did not, I shou'd be ruin'd for ever: And they brought a Parson and Clerk up Stairs; the Parson saying, I hear there is a Couple to be Married, ask'd no Questions, but told me, If I did not Marry this Gentleman, I shou'd be sent

Mrs. Rawlins's
Evidence.

sent to *Newgate*. So with many Threats and Persuasions, they at last prevailed with me to Marry. I was forc'd to Marry him out of Fear, not of going to *Newgate*, but of being Murther'd. It was about Three in the Afternoon when I was Married, and about Candle-light they carried me to *Blake's House* in *Red-Lyon-Fields*; they thrust me up Stairs, and order'd to have a Bed Sheered: Mrs. *Baynton* bid me Undress, and go to Bed. I said I wou'd not. Then she said she wou'd pluck the Cloaths off my Back; and at length, she forc'd me to go to Bed. And it was *Saturday* Morning before I was releas'd; then some of my Friends came to the Place where I was.

L. C. J. Mr. *Swendsen*, what do you answer to the Evidence?

Prisoner. My Lord, I desire Council.

L. C. J. It cannot be allow'd you.

Prisoner. I desire my Wife may stand by her self, and none of those People near her.

She was order'd to be remov'd.

Prisoner. The first Time I was at Mrs. *Nightingale's*, I was desir'd by Mrs. *Bush*, and Mrs. *Baynton*, to make a Bowl of Punch: Which I did; and we were very merry over it. Then I invited them to go on Board a Ship; which they all did; and in a short Time we came very well acquainted: They invited me to partake of a Treat, the following Week, and there was one Mr. *Pugh*, who courted Mrs. *Rawlins*, and I told her, I cou'd not be easy, while she suffer'd Mr. *Pugh* to kiss her: She desir'd me to be easy, and it shou'd be remedied.

Mrs. *Rawlins*. I do not remember any such Words ever came out of my Mouth.

Prisoner. Did not you say, If I wou'd not sit by you, you wou'd not eat a Bit? And did not you give me some Encouragement?

Mrs. *Rawlins*. No: I do not remember any such Thing.

Prisoner. After Dinner we had our Bowl, and Walnuts; she pill'd them, and heap'd my Plate with them, that every Body took notice of it;

Council deny'd the Prisoner.

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Swendsen's Defence.

The TRIAL of

she jogg'd me with her Knee, that I shou'd take them; and gave some to Mrs. Baynton to give me.

L. C. J. Holt. Mrs. Busby, Did you see any thing of this Kind?

Mrs. Busby. No, my Lord.

Mrs. Rawlins. I don't know I was kinder to him than the rest of the Company.

Prisoner. Mr. Pugh was afraid I should get away his Lady, and before he went away, he told him she did not care for him, to make me easy; and Mrs. Busby complain'd to her of it, at Mr. Scoreman's, the Picture-Drawers; who is an Evidence for me.

Mr. Scoreman was call'd.

L. C. J. Holt. You are not upon your Oath, but are under the highest Obligations to tell the Truth.

Scoreman. Mrs. Busby, the young Lady, and Mrs. Baynton, were at my Lodgings, and while I was drawing Mrs. Baynton's Picture, they fell into Discourse about Mr. Swendsen and Mrs. Rawlins; Mrs. Baynton said the young Lady had a Love for Mr. Swendsen, more than the other.

L. C. J. Holt. Did you hear Mrs. Busby or Mrs. Rawlins say any thing of Love?

Scoreman. I heard but a few Words, and cannot say much.

L. C. J. Holt. You must have a better Witness, or you are in a dangerous Condition.

Prisoner. My Lord, I could tell you divers Things that pass between Lovers, that wou'd be impertinent to relate to a wife Man.

L. C. J. Let us hear some of them.

Prisoner. When we were by our selves she kiss'd me, and squeez'd me by the Hand, when we walk'd privately in the Garden; and when we talk'd of Marriage, she seem'd well pleas'd; and last time I was at the House, we had a Barrel of Oysters, I stood with my Hands behind me, and as she pass'd by, she gave me Squeezes by the Hand.

Mrs.

Mrs. Rawlins. I did not do so, upon my Oath: Nor did I walk in the Garden alone with him.

Prisoner. As for the Arrest, I never knew any thing of it, directly, or indirectly, till I saw her at the Bailiff's House: She Married me with as much Freedom as cou'd be in a Woman.

The Parson was call'd.

L. C. J. Holt. Come, Doctor, How came you concern'd in this Match? The Parson's Evidence.

Parson. A Gentleman fetch'd me, and my Clerk, from the Fleet, to the Vine-Tavern in Holbourn. The Clerk and I went up Stairs, and drank a Pint of Wine: Then we were led into another Room. I ask'd the Prisoner what I was to do? He said, To Marry him to that young Gentlewoman. I read the License, and found it a true License: I ask'd the young Gentlewoman her Name, and found it the same with that in the License; I ask'd her also, if she was willing to to be Married, she said she was willing; and another Gentlewoman was with her, that said she was her Sister: I said, if you consent, and your Sister is willing, here is a License, and I believe there is no Danger to Marry you.

L. C. J. Was it in the License, That the Marriage shou'd be perform'd at the Vine-Tavern.

Parson. No, my Lord, but a Blank was left.

L. C. J. Did you take the Queen's Duty?

Parson. No, my Lord; but return'd their Names to the Supervisors. I never Marry'd any in a Tavern before, and never will do it again.

Mr. Montague. Was you entertain'd there?

Parson. We had a Pint of Wine when we first went in; and after the Marriage I din'd there.

Mr. Corcher, and Mrs. Corcher, were call'd.

L. C. J. Did you hear any Noise, or see any Violence offer'd the young Woman?

Mr. Corcher. No, my Lord.

Mrs. Corcher. There was no Noise; they came in, and desir'd a Room above Stairs; Mr. Holt, the Vintner, came down, and went out; and Hartwell, the Bailiff, told me it was an Arrest, and that the Parson was to be Bail for the Lady.

591.
Corcher's Evidence.

The TRIAL of

Afterwards they told me there was a Wedding above; which we admir'd at, that there should be a Wedding and Bailiffs: And after all was over, the Gentleman and the Lady went out at the Back-door, and took Coach; the Lady did not seem discontented.

Sarah Walker, Cook at the Vine, call'd.

Walker. I was washing the Bar when the young Gentlewoman was brought in; I heard there was to be a Wedding, and went up Stairs to receive Directions for the Supper, and the young Lady sat at one end of the Room, and seem'd very melancholly; I ask'd her what Sauce she wou'd have? she said she wou'd eat nothing at all: But she did not seem melancholly when she went away.

Mr. Blake's Daughter call'd.

Blake. The Lady was pleas'd to say, I shou'd wait upon her; I offer'd to pull off her Stockings, when she went to Bed, she held out her Legs, and I pull'd them off. They came to our House about 592. Thres or Four a Clock in the Afternoon, and went to Bed about two Hours after, and rose again about Seven in the Evening, and went away as soon as Supper was done.

L. C. J. Holt. Did you know what the Design of this was?

Blake. Mr. Swendsen told me, the young Lady was his Wife.

Mr. Blake call'd.

Soll, Gen. What do you know of Mrs. Baynton?

Mr. Blake. I have known her about twelve Years; she was reported to be married to Mr. Baynton, who died about three or four Years ago.

Sol. Gen. How long is it since she lay-in at your House?

Blake. Four Months.

Sol. Gen. When she was such a Woman, and brought a Gentlewoman to your House, and order'd a Bed to be made, How cou'd you admit her into your House again?

Blake. I did not know that it was any clandestine Thing.

The

The Constable call'd.

Constable. I had a Warrant to take up the Men that took the young Gentlewoman away, and went with some Gentlemen to Mr. *Blake's* House, against the *Red-Lyon* in *Red-Lyon-street*. The Gentleman that gave me the Warrant, ask'd her if she was Married? She said, Yes; there is my Husband; and seem'd very much satisfied. He wish'd her Joy; and said if she pleas'd, to go to the Recorder's, there was her Guardian to approve of what she had done. And she wou'd have gone to the next Justice of the Peace.

Prisoner. She said to the Constable, I am very well content with the Marriage, and this is the Ring that married us.

Mrs. Rawlins. I don't know but I might; but I was not in my Senses; I did not know what I said.

L. C. J. Had you been in Bed then? 599.

Mrs. Rawlins. Yes: We were in Bed about an Hour; and Mrs. *Baynton* said I must own him for my Husband, or we were all ruin'd.

Justice *Baber* call'd.

Just. Baber. On Friday, the 6th of this Month, the Prisoner, this Gentlewoman, and another, came to my House in *York-Buildings*, and desir'd me (but the Prisoner in particular) that I wou'd administer a voluntary Oath to the young Lady, (which she was willing to take) That she was Married to this Gentleman. They came in a Coach, without any Officer with them. I did not think I had any thing to do to give such an Oath, and therefore did not tender it. The young Woman was in very great Disorder, not like a Gentlewoman: She spake what she said by her own Consent, but with much Disorder.

Bulkley, the Barber, call'd.

Bulkley. On the 7th of November, in the Forenoon, this Gentleman stopp'd at my Door, and gave me Order to wait upon him; he told me he was Married, and that was his Wife; and the Gentlewoman said so too. I wish'd them much Joy and Happiness. The young Woman said she

did not question it, since what she had done was with her own voluntary Consent.

Mr. *Hudson*, *Blake's* Man, sworn.

Hudson. When Mr. *Swendsen* came with his Wife to our House, he bid her take Mr. *Blake* by the Hand, and ask him how he does. She said, Yes, my Dear: And did so. Mr. *Swendsen* said, This is my dear Wife: And she said, This is my dear Husband; and took him about the Neck and kiss'd him. This was on Saturday Morning.

Mr. *Green* call'd.

Green. Before the Recorder, she own'd she was Married to the Gentleman by her own Consent, without Force or Compulsion. The Recorder said, He was afraid she was drawn in by that Spark, who he fear'd was a Bully of the Town. Mr. *Swendsen* was afterwards withdrawn, and I was thrust out, so that I did not hear what she said after that.

594. Prisoner. As I have been represented as a Bully of the Town, I desire my Friends may be heard, as to my Life and Conversation.

One Witness depos'd, He had dealt with him for above 1000 l.

Another, That he was of good Repute in *Normandy*, and had several Ships consign'd him.

A third Witness depos'd, He knew him in *Norway*, and he was esteem'd worth 10000 Dollars: And they all agreed he was a very honest Man.

Then the Council call'd other Evidence.

595. Witness. It was before the Recorder on Saturday the 9th of this November; while Mr. *Swendsen* held her by the Hand, she own'd her Marriage; but when he was withdrawn, she threw herself upon me, and desired me to stand by her, or she was undone: And then she spake to the same Purpose she has done here; that what she had done, was all by Force and out of Fear.

Mr. *Taylor* sworn.

Mr. *Taylor*. When Mr. *Swendsen* took his Oath, in Order to take out a License, he said the Gentlewoman was Twenty-five, and he was Thirty-five Years Old: I was not present, but my Clerk was,

was, and there is the Surrogate's Hand, and the Prisoners own Hand to it.

Council. My Lord, I hope that may be of the same Force as a Deposition in Chancery.

L. C. J. Holt. It cannot be read as Evidence: Was the License dated the Day he took it? For the License is dated October 14. three Weeks before the Marriage.

Mr. Taylor. It is always dated the same Day it is taken.

L. C. J. Holt. Gentlemen of the Jury, The Prisoner is Indicted for Felony, in taking away by Force Mrs. Pleasant Rawlins, and Marrying her: This is Felony by 3 H. 7. which enacts, *That if any Person shall take any Woman that hath any Substance in Goods or Lands, against her Consent, and Marry, or Defile her, he and his Procurers, and Receivers shall be adjudg'd to be Felons.* And having repeated the Substance of the Evidence, he observ'd to them:

First, *That if she were taken away by Force, and afterwards Married, altho' the Marriage were by her Consent, yet the Prisoner was guilty of Felony.*

Secondly, *That she was taken away by Force, and the Arrest was but a Colour.*

Thirdly, *That they were to consider how far the Prisoner was concern'd in the Force, and that tho' he did not appear till she was at Hartwell's House, yet considering the Circumstances, it was very probable he was privy to it.*

Fourthly, *If it could be imagin'd he was not privy to the Arrest, yet she was under a Force when he came to her, at Hartwell's House, and from thence carried by Force to the Vine Tavern, where she was Married, &c. And tho' she had consented to the Marriage, the first taking was by Force, and the Offence Felony.*

As to his former Reputation, it will signify nothing to him upon this Occasion. If you are satisfied upon the Evidence, that he is guilty of this Crime, you are to find him so.

Swendsen. I desire, my Lord, my Wife may be ask'd, Whether she did not upon her Knees swear,

596.
Some Points
resolv'd on
the Stat. of
Forcible Mar-
riage.

597.

swear, she went away from me as good a Maid as she came to me.

L. C. F. Holt. That is a Question need not be ask'd, since the Marriage is so plainly prov'd, which is sufficient to bring you within the Statute.

The Jury desir'd the Act might be read. Which was done. They also ask'd Mrs. *Rawlins* how Old she was? She said, Eighteen, at *Candlemas*. Then they withdrew.

Trial of Sarah Baynton, John Hartwell, and John Spurr, the 25th of Novemb. 1 Anne, 1702. in the Afternoon.

A Motion was made by the Queen's Council, for putting off this Trial to the 27th. But His Lordship order'd it to begin presently.

The same Indictment was read, as in the preceding Trial of *Swendsen*; upon which they were Arraigned, and severally pleaded, *Nor Guilty*.

Mr. Busby was sworn.

598. He gave the same Evidence as at *Mr. Swendsen's* Trial, That Mrs. *Rawlins* had about 2000*l.* left her by her Father, and 20 *l. per ann.* in Lands, by her Grandfather.

Mrs. Nightingale was sworn.

She gave an Account, That Mrs. *Busby* and Mrs. *Rawlins* had lodg'd with her for three Years past; and how Mrs. *Baynton* came to have Lodgings at her House, (*as in Mr. Swendsen's Trial*;) That Mrs. *Baynton* at first seem'd to be very modest; but coming home to her Lodgings elevated in Drink, the Family began to suspect her, &c. *As in Swendsen's Trial.*

Mrs. Busby was sworn.

599. She gave an Account of Mrs. *Baynton's* taking her and Mrs. *Rawlins* in a Coach, under Pretence of setting them down near the Chappel, and of *Hartwell* the Bailiff's Arresting them in the Coach, and carrying them to the *Star and Garter Tavern* in *Drury Lane*, &c. (*as in Mr. Swendsen's Trial*.) And added, The Woman of the House ask'd me

if

if I ow'd any Money? I answer'd, None that we should be arrested for. She said, Why do you not enquire into the Cause of Action? And Mr. *Wakeman* told me, there was a Writ against *Sabina Busby*, at the Suit of *William Jones*, and he wou'd go for one to Bail me, but I saw him no more till Night. There was a poor labouring Man at Work in the Chimney, and I sent him for Mr. *Nucles* and Mr. *Thornton*; who came, and demanded, on whose Account they kept me? The Bailiffs said they had a Writ against me, of 200*l.* and my Friends offer'd to Bail me, but the Bailiffs shifted off, and I went away to get a Warrant to take care of the young Lady. I had no manner of Dealings with *Jones* in my Life.

L. C. J. Was Mrs. *Baynton* or *Hartwell* there?

Mrs. *Busby*. Mrs. *Baynton* pretended she wou'd go for some of my Friends; but never came again. *Hartwell* was there, and forc'd the young Lady from me, and when I put my Head out of the Window, and cry'd after her, *Spurr* said, What have you got by your Bawling? We are better known here than you: This was the first time I took notice of him; but it seems he rid behind the Coach. He was left with me, when Mrs. *Rawlins* was taken away, and was in the Room when my Friends came; and Mr. *Wakeman* was there too.

Hartwell. Was I there then? Did I ever come back after you was there?

Mrs. *Busby*. I believe you were, but I cannot be positive.

Wakeman the Bailiff was sworn, and gave the same Evidence he had done at Mr. *Swendsen's* Trial, of *Hartwell's* employing him in the Arrest; and said that the Writ was against Mrs. *Rawlins*. That *Spur* stop'd the Coach, and *Hartwell* order'd it to drive to the *Star and Garter* Tavern; That Mr. *Hartwell* came to the young Lady and said, You must go to my House: And she said, O Lord! don't part us: But he did so; and put her into a Coach: And from Mr. *Hartwell's* House, she was carried to the *Vine* Tavern in *Holbourn*.

L. C. J.

L. C. J. Had you a Writ against Mrs. Busby?

Wakeman. No. That against Mrs. Rawlins was but for 20 l. It was Mr. Hartwell that said it was an Action of 200 l.

L. C. J. Was Spurr at the Vine-Tavern any Time?

Wakeman. I left Spurr, Hartwell, and a Tallow-Chandler at the Vine-Tavern.

Mrs. Berkley sworn.

Mr. Serj. Darnel. Do you know the Prisoner, Mrs. Baynton?

Mrs. Berkley. I came to know her by her lodging at Mrs. Nightringale's; and I have heard her say that this Mr. Swendsen was her Brother.

Then Mrs. Rawlins was sworn; and gave an Account of her being Arrested, the 6th of Novemb. as she was going in a Coach towards Oxenden-Chappel, (as she had done before at Mr. Swendsen's Trial;) and that it was Hartwell that forc'd her away from the Star and Garter Tavern, &c.

Hartwell. Who is Mr. Hartwell?

Mrs. Rawlins. Your self, Mr. Hartwell, took me about the Middle, and drove me down Stairs. I cry'd out Murder! and he said, If I did not hold my Tongue, he would send me to Newgate that Minute; and he carried me to his own House in Wuch-street, where Mrs. Baynton came in, pretending she heard my Name as she went by, and said she would send for her Brother to bail me; she went out, and return'd with her Brother Swendsen in half a quarter of an Hour; and Mrs. Baynton, her Brother, Mr. Hartwell, and I, went in a Coach to the Vine-Tavern in Holbourn, and Holt was there to be the other Bail. They were willing to take him, but were very scrupulous in taking Mr. Swendsen's Bail; and told me, in short, I must marry Mr. Swendsen, and that would put an End to it; and Mrs. Baynton said, If I did not Marry her Brother, I must go to Newgate. (And then she gave an Account of Mrs. Baynton's forcing her Ring from her, to get a Wedding-Ring made by it, as in the preceding Trial. Holt brought up the Parson, and I did not stay in the Room a quarter of an

Hour

Hour after I was Married, but from thence Mr. Swendsen and Mrs. Baynton carried me to Mr. Blake's House in Holbourn, and forc'd me to go to Bed; Mrs. Baynton and Mr. Blake's Daughter undress'd me; I was in Bed there an Hour or two.

L. C. J. Did you see Hartwell at the Vine Tavern before you were Married?

Mrs. Rawlins. Yes: Mr. Hartwell said he would confider with Mrs. Baynton about the Bail, and they all went out, and left me alone; and Mrs. Baynton return'd and told me they had refus'd the Bail.

L. C. J. Was there any Proposal made of your Marriage to Mr. Swendsen before you was left alone in the Room? Had you the Ring before that?

Mrs. Rawlins. Not as I know of my Lord.

L. C. J. She was left in the Room alone on her Desire to be Bail'd, and therefore she would not make her Escape then. It is now Time for you, Mrs. Baynton, to make your Defence.

Mrs. Baynton. Mrs. Busby, when Mr. Swendsen came to her House, first call'd him her dearly beloved Likeness; Did she not, Mrs. Rawlins?

Mrs. Rawlins. I don't know but she might once to Mrs. Baynton.

Mrs. Busby. I thought him very much like my Husband in one part of his Face, and Mrs. Baynton her self call'd him my beloved Likeness.

Mrs. Baynton. My Lord, I would ask Mrs. Rawlins several Questions; Did not you say one Sunday, when the Family were at Church, you wish'd Mr. Swendsen there?

Mrs. Rawlins. I do not remember I said any such Word.

Mrs. Baynton. Did not you come to my Bed-side often, and kiss and hug me, and talk with Pleasure of Mr. Swendsen?

Mrs. Rawlins. It may be I might do so, but I did not speak it with a Design to have him.

Mrs. Baynton. Did not you tell me, you had a great deal of ill Usage, and that you liv'd more like a Servant than any thing else; that when an

other

other Lodger was there, because you went into her Room to see her, you was chid very severely.

Mrs. Rawlins. I don't know but that I might.

L. C. J. But why did you do it?

Mrs. Rawlins. My Lord, I can give you no Account.

L. C. J. Did you bid her tell him, That you knew a Gentlewoman at her own Disposal, that won'd make him a very good Wife?

Mrs. Rawlins. Mrs. Rawlins. I might say, I wish'd her Brother acknowledg'd a very good Wife, I did not speak it with Design to Marry her Brother, but was resolv'd to take Advice of my Friends.

L. C. J. Did you ever tell her, you wish'd your self Mr. Swendsen's Wife?

Mrs. Rawlins. I don't know whether I did or no.

L. C. J. How came you to have such a good Opinion of Mr. Swendsen?

Mrs. Rawlins. Mrs. Baynton told me he was a very good temper'd Gentleman.

L. C. J. Did you tell Mrs. Baynton, That notwithstanding what you said of Mr. Swendsen, you would never Marry without the Consent of your Friends.

Mrs. Rawlins. I did often say, I would never Marry without their Consent.

L. C. J. Hath there been any Courtship carried on between Mr. Swendsen and you?

Mrs. Rawlins. No more Courtship to me, than to all the Family.

Mrs. Baynton. Did not you walk with Mr. Swendsen in the Garden several Times, and discourse of Love, and he said he would have no Body but you, and you said you would have no Body but him.

Mrs. Rawlins. I was never in the Garden with Mr. Swendsen, but that Time, and then not alone. And I never said I would have no Body but Mr. Swendsen.

Mrs. Baynton. My Lord, I would have her ask'd whether she consented to be taken away, directly or indirectly?

Mrs.

Mrs. Rawlins. It was all against my Knowledge and Will, I never consented to it.

Mrs. Baynton. Did not you send all Mr. Pugh's Letters back again, and desir'd him in your Letter to come no more at you? And that you wou'd have nothing to say to him.

Mrs. Rawlins. I do not remember that I spake any thing to Mrs. Baynton, tho' I did send back the Letters.

L. C. J. You sent his Letters back again, pray upon what Account did you do so?

Mrs. Rawlins. It was not upon Mr. Swendsen's Account, but upon Things we heard of Mr. Pugh that was very unhandsome, Mrs. Busby can tell the same.

L. C. J. Did the Courtship break off?

Mrs. Rawlins. My Lord, it was but the Day before this Thing happened.

Serj. Darnel. Mrs. Busby, did you know of the sending back the Letters?

Mrs. Busby. Yes, Sir, it was by our Advice; 605; the Letter was wrote by Mrs. Berkly.

L. C. J. Mrs. Baynton, have you any thing to ask?

Mrs. Baynton. Perhaps I may have more to say, my Lord, but I am in Confusion: Mrs. Busby, as well as Mrs. Rawlins, was never easy, but when Mr. Swendsen was there.

L. C. J. Upon the Oath you have taken, Mrs. Rawlins, did you consent to your being taken away after the Manner you were, or gave any Encouragement to Mr. Swendsen?

Mrs. Rawlins. No, my Lord, I do not know that I gave him any manner of Encouragement.

Mrs. Baynton. My Lord, she gave him all the Encouragement imaginable.

Betty, Mrs. Baynton's Maid, call'd.

L. C. J. Did you ever hear that ever Mrs. Rawlins went into her Chamber to cry, or that she enquir'd after Mr. Swendsen?

Betty. No, my Lord, I never heard so.

Mrs.

Mrs. Baynton. Betty, did not you say that she ask'd you several Times of Mr. Swendsen and wish'd he would come and dine with them.

Betty. I never heard her, but once.

Mr. Swendsen's Fury return'd, and Erasmus Johnson, a Dane, and one of the Fury, said he was not satisfied.

Johnson. My Lord, I do not find from any Evidence that hath been given, that he was privy to the Arrest.

L. C. J. Did not he go to Hartwell's House, and from thence, while she was under the Force, went with her to the Vine-Tavern, where he Married her? Which was a forcible taking by him.

Foreman. My Lord, he did agree, that this was a Point of Law, and said he would leave it with Your Lordship; he believes she was forc'd, but he thinks he was not privy to the Woman's Actions that he employ'd.

L. C. J. When the Bailiffs were employ'd to take her, it appears by the Sequel, that it was with an Intent that he might Marry her: What can be plainer? Govern your self by Reason: Did not he take Advantage of the Force? And was that to any other Purpose, but for him to Marry her? There was no Cause of Action either against her or Mrs. Busby.

Judge Powel. He was guilty of the Thing, he consented to it afterwards.

606. Johnson. My Lord, I don't know there was any Violence us'd by him, either in Word or Deed.

Foreman. He believ'd Mr. Swendsen did employ the Woman.

L. C. J. Was not he present when Violence was us'd?

Johnson. Yes, my Lord.

Marrying a Person under a Force, Capital, tho' the Man did not contrive it.

L. C. J. Then was Violence us'd by him: It appears very evident, that she was under a Force, before she was Married, when she was Married, all Night after, and the next Day, when she was at the Recorder's.

Johnson.

Johnson. I do not believe Mr. *Swendsen* employ'd the Bailiffs.

Judge Powell. If he did not set them to work, yet his Act afterwards made it as bad as if he had actually employ'd the Bailiffs.

Johnson. I can say no more, I must agree with *Swendsen* Con-
victed.
the rest.

Foreman. We are all agreed now: He is Guilty.

L. C. J. Mrs. *Baynton*, will you go on?

Mrs. Baynton. Did not you undress your self at Mr. *Blake's*?

Mrs. Rawlins. You undress'd me.

Mrs. Baynton. Did not you say to Mr. *Swendsen*, when you were in Bed, Come to Bed, my dear Husband, you must love no Body in the World but me; and that you lov'd him above all the Men in the World?

Mrs. Rawlins. No, Mrs. *Baynton*, I did not, I have taken an Oath this Day, and I said no such Things.

Council. Mrs. *Baynton*, do you know that ever Mrs. *Rawlins* writ any Letters to Mr. *Swendsen*?

Mrs. Baynton. She wou'd, but I wou'd not let her: And when she was Attested, I offer'd Mr. *Hartnell* Bail for her. When Your Lordship hears, you will believe me no other than a Friend to her.

L. C. J. If you had no Design but her Good, how came you to Mrs. *Nightingale's* on such a Design, with Pretence that you had a Law-suit, &c. And why did you carry her out in the Coach, in order to be Arrested? 607

Mrs. Baynton. My Lord, it was not the first Time they went with me in a Coach; they desir'd me several Times to set them down, and I did so. Mrs. *Rawlins*, did not you several Times desire to sit next to Mr. *Swendsen*, when we were at Cards, and send for Walnuts and Apples to treat him?

Mrs. Rawlins. I did send for Walnuts and Apples, but not to pleasure Mr. *Swendsen*.

L. C. J. Mrs. *Baynton*, why did you say Mr. *Swendsen* was your Brother?

The TRIAL of

Mrs. Baynton. He was my Brother by Adoption.

L. C. J. By Adoption! what do you mean by that?

Mrs. Baynton. *Mrs. Rawlins*, if you had no mind to *Mr. Swendsen*, why did you give him such Encouragement as to kiss him, and go betwixt his Legs?

Mrs. Rawlins. I take it upon my Oath, I never did so in all my Life.

Mrs. Baynton. Did you not love him?

Mrs. Rawlins. No; not well enough for to make him my Husband.

L. C. J. Pray *Mrs. Baynton*, give an Account how you have liv'd: Had you a Husband?

Mrs. Baynton. Yes, my Lord, he has been dead eight Years, to Morrow.

L. C. J. But you have had a Child within these four Months: Are you Married now?

Mrs. Baynton. Yes, my Lord; and I could prove it, but I don't think it proper, for some Reasons.

L. C. J. I think it very proper; pray give an Account how you have liv'd.

Mrs. Baynton. I have a Sister in *Barbadoes*, that has been very kind to me.

L. C. J. *Mr. Hartwell*, who directed you to take out this Writ against *Mrs. Rawlins*, at the Suit of one *Jones*?

608.
Hartwell's
Defence.

Hartwell. *Mr. Holt* sent for me to the *Star and Garter* Tavern, and we went from thence to the *Mitre-Tavern* in *Westminster*, which is *Mr. Holt's* House, where *Mrs. Baynton* came in, and gave me Money for the Writ, and I sent my Assistant *Spur* for it; when I serv'd it at the *Star and Garter* Tavern, this Woman, *Mrs. Baynton*, ask'd me where I liv'd, and bid me take care of my Prisoner (*Mrs. Rawlins*) and take her along with me to my House, or I shou'd lose my Money: So I carried her to my House, and having Business elsewhere, I left her with my Wife, and a young Woman to keep her Company. When I came again, I found *Mr. Swendsen* and this Gentlewoman (*Mrs. Baynton*) there,

there, drinking a Pint of Sack. They told me, If I would go to any Tavern, the Business should be made up; we took Coach, and went to the *Vine-Tavern*, and there the Matter was made an end of. And they told me they would satisfy me for my Trouble on *Monday-Night*, if I would meet them at Mr. *Holt's*. I know of no Writ against Mrs. *Busby*.

L. C. J. How can you prove Mrs. *Baynton* employ'd you?

Hartwell. My Lord, my main Witness, Mr. *Holt*, is fled; but I suppose his Wife is here.

Just. Powel. A Woman cannot be a Witness for or against her Husband; why should she be call'd?

A Wife no Evidence for or against her Husband.

Wakeman was call'd, and he call'd another, who depos'd, That Mrs. *Baynton* confess'd before the Recorder, That she gave Money to, and employ'd *Hartwell*, to sue out a Writ against Mrs. *Rawlins*, at the Suit of *William Jones*, for 20 l.

Hartwell. Madam, Were you not free to go to the *Vine-Tavern*?

Mrs. *Rawlins*. I do not deny that I was free to go; there was no Rudeness offer'd then.

L. C. J. Mr. *Spurr*, What say you?

Spurr. I know nothing more of the Matter, than Mr. *Hartwell's* giving me Money to take out *Spurr's* De- the Marshal's-Court-Writ; and I was employ'd by fence. him.

Anne Cotchet sworn.

Mr. *Montague*. Pray give an Account how *Hartwell* brought the Prisoner to the *Vine-Tavern*.

Cotchet. When the Coach came, *Hartwell* order'd a Pint of Wine for the Coachman, and the Drawer questioning who wou'd pay for it, *Hartwell* came to me, and said, it was an Arrest for 120 l. and he wou'd see us paid.

Hartwell. Did you see me in Company with the Parson?

Cotchet. You came down Stairs, and order'd a Pint of Wine for the Parson, and half a Pint besides, and told me the Parson was the Bail.

Hartwell. I did not know the Parson was in

the House, till I had just done my Business, and was going away.

Chief Justice directs the Jury.

L. C. J. Gentlemen of the Jury, These three Prisoners are Indicted for Felony, on the Statute made the 3d of Hen. 7. That they, with *Haagen Swendsen*, now Convicted, and *Thomas Holt* that is fled, did Violently and Feloniously Assault one *Pleasant Rawlins*, being seiz'd of an Estate of Inheritance of about 20*l.* per Ann. and possess'd of a Personal Estate of 2000*l.* and took her away by Force; and that the said *Swendsen* did marry her.

610. And His Lordship having summ'd up the Evidence, observ'd to the Jury, That if *Hartwell* was privy to the intended Marriage, when he took Mrs. *Rawlins* into Custody, they ought to find him Guilty; but if he only acted as a Bailiff, and did not know of the Design, then he was not Guilty; but that his Arresting Mrs. *Busby*, against whom he had no Process, and his forcing Mrs. *Rawlins* from her, and his pretending the Warrant against Mrs. *Rawlins* was for 120*l.* when in Truth, it was but for 20*l.* and his pretending the Parson was to be Bail, were strong Circumstances against him; and tho' he was not present in the Room where the Marriage was, yet being then hard by, in the not present at same House, if he knew what Design was on foot, the Marriage. it was all one.

Presumptions of *Hartwell's* Guilt.

He might be Guilty, tho' not present at the Marriage.

As for *Spurr*, he was an Under-Officer, and it did not appear he was privy to the Design; therefore he directed them to acquit him.

As to Mrs. *Baynton*, she had own'd she employ'd *Hartwell*, and paid him for the Writ; and her pretending to set down Mrs. *Busby* and Mrs. *Rawlins* at *Oxenden-Chappel*, was with a Design to bring them under that Force to effect the Marriage: And left it to them, If from the beginning to the end, she was not an Actress and Manager in the whole Business; and if so, they were to find her Guilty.

Mrs. *Baynton* Convicted, *Hartwell* and *Spurr* Acquitted.

Then the Jury withdrew for half an Hour, and brought in Mrs. *Baynton* Guilty; *Hartwell* and *Spurr* Not Guilty.

L. C. J.

L. C. J. *Martwell*, you have had a very merciful Jury; let it be a Warning to you for the future.

November 28. The Prisoners were call'd to the Bar to receive Sentence of Death: It being demanded of *Haagen Swendsen*, what he had to say, why he should not receive Sentence of Death? He observ'd, Mrs. *Rawlins* had varied in her Evidence, and confess'd several Things in Mrs. *Baynton's* Trial, that she deny'd in his: Mrs. *Baynton* made the like Observation; and added, That she was with Child. To which my Lord Chief Justice reply'd, That was no Plea against Judgment.

Then Mr. Justice *Powel* having made a short Preface, and observ'd how great a Crime this Fortune-stealing was, how much worse than any other Kind of Robbery; and that tho' *Swendsen* was not at the first taking, yet there were strong Presumptions to conclude him privy and consenting to it; and particularly, his having a License prepared for the Marriage. That supposing he was not privy to the Arrest at first, yet knowing of the Force, and being present afterwards, when she was threatned to be sent to *Newgate*, if she did not Marry him, and taking Advantage of her being under these Menaces; this was in Law a forcible taking. Sentence of Death was pass'd on Mr. *Swendsen* and Mrs. *Baynton*: After which *Swendsen* acknowledg'd the Arrest to be all his own Contrivance, and not Mrs. *Baynton's*. Mrs. *Baynton* said she was with Child, and a Jury of Matrons being impannell'd, brought her in quick with Child; whereupon Execution was respited till her Delivery.

611.

Swendsen and
Baynton re-
ceive Sen-
tence of
Death.

612.

F 3

The

The Trial of RICHARD HATHAWAY, at Surrey-*Affizes*, the 24th of March, 2 Anna 1702.

The Information, for being an Impostor, and endeavouring to persuade People that he was bewitched.

AN Information was brought against him, in the Name of the Attorney-General, which set forth, That the Defendant being a Person of evil Fame, and an Impostor, and maliciously contriving to take away the Life of one Sarah Morduck, the Wife of Edward Morduck, Waterman, who for the whole Course of her Life had been an honest and pious Woman, and not a Witch, nor using Witchcraft; the 11th Day of February, in the Twelfth Year of the Reign of the late King, at Southwark, in the Presence and Hearing of divers Persons, did falsely, devilishly, and knowingly, and as a false Impostor, pretend and affirm himself to be bewitched by the said Sarah, and that by reason thereof he could not eat, but had fasted for ten Weeks; and was also affected with divers Diseases, and that by his drawing Blood from the said Sarah, by scratching, he should be freed from his said pretended bewitching: And that thereupon the Defendant did scratch the said Sarah, and did draw the Blood of the said Sarah, by such his scratching, and thereupon he falsely affirm'd, that by drawing the said Blood, he was freed from the said Diseases; whereas in Truth and Fact he was never bewitch'd, nor had he fasted, as aforesaid, and well knew he was not bewitched by the said Sarah; in Contempt of the said late King and his Laws, and against the Peace, &c.

Mr. Raymond open'd the Information, and Mr. Conyers shew'd the Nature and Course of the Evidence.

Then

Then Mr. Broderick, another of the Council, observ'd, That the discovering and punishing such a Cheat, was highly necessary, not only for the vindicating the publick Justice of the Nation, but for the sake of Religion, which suffers by nothing more, than by the countenancing of indirect Practices, made use of upon a Pretence of maintaining and supporting its Credit. That Religion has in it self such genuine and native Truth, as must work Conviction upon the Understandings of all Persons, who allow themselves Leisure to consider it without Prejudice: But when Tricks and little Arts are carried on for a Time, and attain a general Credit, and appear afterwards to be what are call'd pious Frauds, they do far more Mischiefe, than all the Good propos'd by such Practices can make amends for. For when Men who are Sceptically inclin'd, find that the Generality of Mankind run away with Stories of this Nature, and those Facts afterwards prove undeniably false, they carry their Doubts on much too far, and are apt to conclude, that they cannot securely rely upon the Relation of others, and even on the general Consent of Mankind, for the Certainty of any Fact whatsoever; That it was therefore the Duty of all Persons, that are concern'd for Religion, to endeavour to detect such Practices, which weaken one of its most solid Foundations.

That this Prosecution was also very necessary, in order to vindicate the Justice of the Nation; for here was a Woman who had underwent a solemn Trial, and upon a full Hearing been acquitted; yet afterwards, notwithstanding the thorough Examination of the Fact, and such an Evidence given, as convinc'd every unprejudiced Hearer, of her Innocence, and the Malice and Hypocrisy of the Accuser, such a Spirit did reign, that it was represented, that the Accuser (now the Defendant) had hard Measure; and not only the Jury, but the Court too, were reflected on. Nay, it went so far, that after the Innocence of the Woman appear'd, by her Acquittal, a certain

614.
The Reasons
given for this
Prosecution.

Magistrate so far gave Credit to this Impostor, that when the poor Woman was abus'd by the Rabble, and her Life being in Danger, she made Application to him for Protection, instead of affording it to her, he encouraged her Prosecutors, as if she had really been guilty of the Witchcraft laid to her Charge; and considerable Collections were made for this Man, to support his Spirits, under the Disappointment he met with, in her being acquitted.

That this Prosecution was necessary too, upon the Account of the poor Woman, who, unless some Check were put to the unruly Proceedings of unthinking People, was not yet safe in her House, but in Danger of being torn to pieces; and it was thought most proper, that this Matter should be thoroughly examined in this Place, where the Scene of his Counterfeiting for the most part did lie; that prepossess'd People might be Ear-Witnesses of the Fairness of the Proceeding, and that all Persons might have an Opportunity, if they thought fit, of offering any thing proper to be offer'd in his Defence.

615. Mr. *Phipps* also gave some further Account of the Nature of the Crime the Defendant was charg'd with, and of the Course of the Evidence to be given.

Then Dr. *Martin* was sworn.

616. Mr. *Conyers*. Pray give the Court an Account whether you know *Richard Hathaway*, and when was the first Discourse of this Witchery.

Dr. *Martin's*
Evidence concerning the
Defendant's scratching a
Stranger, instead of the
pretended Witch.

Dr. *Martin*. On the 9th Day of February was Twelvemonth, there was such a Hurly-burly in the Church, that the Curate cou'd not go on in Reading Prayers; and enquiring into the Matter, the Sexton told me, there was a Witch in the Church, and brought one *Sarah Morduck* to me into the Vestry; she began to cry, and said, she had given no Occasion for this Report of her: But I desir'd her to continue in the Vestry, because the Congregation were so much disturb'd, that they would go out of the Church, if she staid in it; when Sermon was ended, I found the

the Sexton had let her out, while the Psalm was singing, lest she shou'd be torn to pieces, if she had staid till all the People went out: Afterwards many of my Parishioners made Application to me to go to *Richard Hathaway*, who was suppos'd to be bewitch'd. I went the next Day, and his Master told me he was blind and speechless, but very sensible, and knew every one by their Voice; whereupon I went into the Room, and desir'd him, if he knew me, to hold up his Hand, and he did so, and took my Hand and kiss'd it; I ask'd him if I should pray by him, in the Prayers of the Church? And if he desir'd it, to hold up his Hand; and he did so: And I pray'd by him, and he seem'd affected with it, and held up his Hands several Times: I went down Stairs, and discours'd with his Master of the Occasion of his Illness. He said he thought *Sarah Morduck* had bewitch'd him, for he had scratch'd her, and found Good by it. Whereupon it came into my Head to try an Experiment, and accordingly I went the next Day to Visit *Richard Hathaway* again, having order'd *Sarah Morduck* and her Brother *Hern* to follow me thither: I told *Hathaway* I was inform'd, he had receiv'd Benefit by scratching *Sarah Morduck*, and ask'd him if he thought he should receive any Benefit by scratching her again, and if he did, he should hold up his Hand; which he did. I went out, and at length prevail'd upon one *Johnson* to let him scratch her; but his Mistress, *Wellings*'s Wife, said, that would signify nothing, for they had try'd another Woman before. (But I understood that Woman was much bigger than *Sarah Morduck*.) And I desir'd the Satisfaction of seeing it my self; which being consented to, I went up Stairs, with *Sarah Morduck*, this *Johnson*, and many of the Neighbours; says I to *Richard Hathaway*, Though you cannot see, you can hear that there are many People in the Room, now before all these People, do you believe that *Sarah Morduck* has done you this Mischief, and that you shall be reliev'd by scratching her? if you do, hold up your Hand; and he did so. *Sarah Morduck*

duck ask'd him what was the matter with him; and I said, Do you believe this to be the Person that has bewitch'd you? If you do, hold up your Hand; which he did. Then I ask'd *Sarah Morduck*, Are you willing this Man should scratch you? And she said, Yes, with all my Heart; he shall have my Heart's Blood, if it will do him any Good. Then, says I, Pray give me your Hand; and she answer'd, Here it is: Then, instead of her Hand, I took *Johnson's*, and clap'd it into his; and I did observe, that two or three times he felt from her Wrist to her Elbow: Whereupon I said I cou'd not wait, I had something else to do, if he wou'd not scratch, I wou'd be gone. Then he scratch'd her, and I told him, he had drawn Blood, and I sent *Johnson* out of the Room, and I and *Morduck* stood together, but he lay still for some Time; then says I, I wou'd fain see how his Eyes are now, come some of you and look, do not his Eyes twinkle? with that, both his Eyes were as open as mine are now, and he caught hold of the Apron of *Sarah Morduck*, and look'd her in the Face. Then I told him his Mistake, and *Johnson* came in with her Arm bleeding; I told him, that was the Woman he had scratch'd, and not *Sarah Morduck*. The Fellow, upon this, seem'd very much cast down, and several People were satisfied. I went into *London*, and return'd to the House again about Five a Clock, where I found a greater Mob than before, and was accosted by the Fellow's Master and Mistress at my coming in, saying, What have you done? You have ruin'd me and my Family! You have given it out to be a Cheat, and now he is in a worse Condition than he was before. And I was inform'd next Day, that *Sarah Morduck* was dragg'd to the House again, some time after I went away, and *Hathaway* had scratch'd her, and his Eyes were open'd, and he eat and drank, and walk'd about. Whereupon I sent for him, and talk'd with him, and he ask'd me if I did not think he was bewitch'd? I said I did not believe he was. He answer'd, Then he might as well not believe what I said in the Pulpit;

Pulpit, and that he might say to me, as our Saviour said to the Jews, *Tho' you see Miracles, you will not believe.* Whereupon I turn'd him away. About Easter last I was sent for to Sir Thomas Lane's, where I found Hathaway, his Master, and several others: Hathaway look'd briskly, and was eating heartily; and I was told he had drawn Blood of Sarah Morduck before Sir Thomas Lane, and that had brought him to himself. I was sent for in to Sir Thomas, where was Sir Owen Buckingham, and Dr. Hamilton, and I gave the same Account of this Matter I have given here. Hathaway pretended he did not remember I was with him: Whereupon I desir'd his Master Welling might be call'd in, who attested my being there, and that Hathaway was in his Senses at that Time. Sir Thomas Lane said he had a violent Fit afterwards, and that made him forget what was done. I ask'd his Master, how he came to take such Pains to recover his Man again, when he was press'd a-board a Ship, he having formerly express'd such a Desire to get rid of him? Sir Owen Buckingham said it was his Charity, knowing the Condition he was in. So I came away, and a little time after heard that this Sarah Morduck was bound over to the Assizes, and I was Subpan'd to give Evidence last Assizes at Guildford: Before the Assizes came on, there were Bills put up in several Churches, and particularly at Christ-Church, where I happen'd to Preach, viz. *A poor Man being afflicted by an Evil Woman, now coming to her Trial, desires the Prayers of this Congregation.* When I came from the Trial at Guildford, I thought all People had been satisfied with the Justice done there, but when I came to Town, I was abus'd by many People, both openly and privately, saying, *You have the Blood of that innocent Man to lie at your Door; the Woman had been hang'd, if you had not saved her; the Judgments of God will fall on you.*

Mr. Serj. Fenner. What was done by other People, ought not to be given in Evidence against us.

L. C. J. What other People have said, abstractedly consider'd, ought not to affect Richard

Hathaway.

Where the Actions of others may be given in Evidence against the Defendant.

Hathaway; but if there be Evidence that *Hathaway* hath been guilty of Deceit, and a Design to deceive People, will you not allow it to be given in Evidence that the People have been deceiv'd?

619: Dr. Martin. I have only one Thing more to say: It was reported, that I had been brib'd, that I had receiv'd several Guineas; that the Judge was brib'd, and the Jury brib'd; and the Judge wou'd not suffer the Woman to be search'd, he being bribed.

Mrs. Johnson's Evidence, who was scratch'd by the Defend. Then Mrs. Johnson was sworn, who depos'd, She had been scratch'd by *Richard Hathaway*, instead of *Sarah Morduck*, in the Manner as Dr. Martin depos'd above.

William Bateman sworn.

Mr. Coniers. Pray give an Account what you know of the Defendant's Vomiting Pins.

Bateman's E. Bateman. On a Sunday-Night about this time
vidence, who Twelvemonth, a Woman came to Dr. Martin's
discover'd the House, and said, if the Doctor wou'd come then,
Fraud, as to he might see *Hathaway* Vomit Pins. Can I see
the Defen- him, says I? Yes, says she. So I went immedi-
dant's Vomit- ately, and in the House there were little Chinks,
ing Pins. that I cou'd see through: I stood some time, and
saw him walk about the House, and heard him
talk to the People. He seem'd to be as well as he
is now: But when I knock'd, and came in, he
seem'd to be troubled, and feign'd himself to be
in some Pain. Says I, I hear you spew Pins;
prithee let me see thee. So he sat on a low Seat,
and they gave him something in a Cup, by drink-
ing of which, I was to see him Vomit Pins: But
I cou'd not perceive he swallow'd any. He pre-
tended to be in a great Agony, and Vomited four-
teen or fifteen Times; and there were some Hun-
dreds of Pins upon the Ground, but I thought the
Pins were dropt by one or other, for I took up
some of them, and they were dry; and I took up
two or three in a Chain, and said, I believ'd
those were the Pins that were shewn at our House.
No, no, says his Master, these are not the same;
and endeavour'd to satisfy me that he did Vomit
those Pins; so I desir'd he might have a Pot to
Vomit

Vomit in, and I had a Pot brought, and made very clean, and I search'd his Mouth, and found no Pins there; and I held the Pot close to his Mouth, and he often endeavoured to put his Hand to the Pot, and I would not suffer him, for I perceiv'd his Hands often moving to his Pocket. He Vomited several Times, and there were some Pins scattered on the Ground, *but none in the Chamber-Pot*: And I said, Those Pins did not come out of his Mouth; but the People were very pressing on me to believe they did. I said, I believ'd he had a Slight of Hand to convey them there; and I took hold of his Pocket. He stop'd my Hand, and would not let me put my Hand into it. But after some Time, says one, Let him search your Pockets. So I did; and took out several Things, and among the rest, several Parcels of Pins, crooked, and in strange Figures, like those upon the Floor.

Mr. Broderick. Now, my Lord, we will shew, that he drew up a Narrative of this Business for the Press.

Richard Ball, the Printer, sworn.

Ball. About a Twelvemonth ago, *Richard Ball's* Evidence of *Hathaway* brought a Writing, and also a Dish full dence of the of crooked Pins, which he told us he had Vomit- Defendant's ed, and said, that he had been afflicted by a Wo- offering a Nar- man in *Southmark*; and I think he said he had not rative of his eat any thing since my Lord-Mayor's-Day. And Condition to be Printed. he desir'd us to Print his Paper, which he said related the Story of his Vomiting Pins. My Master stood by, says he, You look very well, I will have nothing to do with it, I believe you are a Cheat; and upon that he went away.

Mr. Hearn was sworn.

He depos'd, That he was in a Room when *Hathaway* scratch'd *Johnson*, instead of *Sarah Morduck*, the 11th of February: And gave exactly the same Evidence of *Sarah Morduck's* Relation of that Matter, as *Dr. Martin* depos'd a- being forc'd to remove to above. *Hearn* depos'd further, That after the Doctor and he were gone, the Company said it was London, and being carried a Trick put upon them; the Man was bad again, before Sir *Tho. Lane*. and they would have the right Witch scratch'd, and

that 624

that they abus'd *Sarah Morduck*, and left her in a wretched Condition; whereupon she sent for the Deponent, and he procur'd Justice *Rich's* Warrant, and took up one *Osborn*, but for want of Evidence the Justice discharg'd him: After this she was remov'd to *Pauls-Wharf*, and a Company of Fellows follow'd her thither; that he got Sir *Thomas Lane's* Warrant, and took up *Hathaway*, and one *Jones*; but Sir *Thomas* giving Credit to the Story of Vomiting Pins, said there was Provocation enough for what they did; and the Fellow pretending to be in a Fit, Sir *Thomas Lane* wou'd make *Sarah Morduck* let him scratch her again; and when he had drawn Blood of her, he appear'd very brisk, and they call'd for Bread and Cheese, and he eat it greedily; tho' he pretended he cou'd not swallow any thing before: Then Sir *Thomas* order'd her to be stripp'd above Stairs, but Dr. *Hamilton* said he cou'd find nothing about her: However, Sir *Thomas* committed her to Prison, tho' the Deponent offer'd a Hundred Pound Bail; but when Dr. *Martin* had been with him at Night, he permitted him to Bail her.

Mr. *Kensy* was sworn.

Mr. *Coniers*. Pray give an Account what you know of *Hathaway's* Fasting.

Kensy's Evidence, who discover'd the Fraud, as to the Defendant's Fasting.

Kensy. He was committed to my Cure the first of *November* last; I went to Visit him that Morning in the *King's-Bench* Prison, and the Servants in the Prison told me his Tongue was swell'd; I search'd his Mouth, but found nothing amiss; and about Twelve the same Day, he was brought to my House; I kept him in the Room where we Din'd, and offer'd him Meat and Drink several Times, but he refus'd it. About Eight at Night, we put him to Bed, and took his Cloaths out of his Chamber. The next Morning we offer'd him Meat again, and he refus'd to eat; we brought him his Cloaths, and he was furly, and refus'd to rise. At Night I offer'd him a Glas of Cordial, which he refus'd. At the same Time we found his Rug wet, which we discover'd to be with his Urine dropping thro' the Tester of the Bed; he having

ving hid his Urine upon it, in the Cover of a large Box, thro' which it drain'd: I entreated him to discover who set him to work, for I look'd upon him as a poor innocent Fellow: But he would discover nothing. The next Morning, I forc'd him to rise, but he continu'd resolute in his Humour of Fasting, and I found Persuasions, and Promises of Pardon could not prevail, nor Threatnings that I would starve him, if he would not confess: So I feign'd a Quarrel with my Maid, and rail'd at her in his Presence, saying, she was as very a Hypocrite as *Richard Hathaway*, and I would be troubled no more with her: When I was gone, the Maid, by my Directions, rail'd at me, and caution'd him against taking any thing from me, or my Brother, and she would feed him: After this we took him up every Day, and contriv'd Places and Holes, whereby we discover'd him to eat and drink heartily, sometimes three times a Day, he thinking no Body was Witness to it but the Servant: One Day particularly, he eat freely, and drank strong Beer and Brandy after it, and brought it up again, but I coming in, he raked the Ashes over it to hide it: The next Day I offer'd him something to eat, and he pretended to be so weak he cou'd not get off his Chair, tho' he had eat several Days before, and danc'd, and plaid upon the Tongs. On the 8th Day he endeavour'd to make his Escape: On *Monday* the 10th, I gave him his Cloaths, and being alone, he had not Patience to dress himself, but immediately seiz'd me, and struggling with him, he pretended Feebleness, and fell on the Bed. He was very surly; but I told him his Friends had discover'd the whole Matter; and then he offer'd to go before my Lord Chief Justice, and discover the whole Truth, but my Lord not being at his Chamber, in an Hour after he recanted, and said he was bewitch'd.

Mr. *Coniers*. Did he at any time tell you how long he had fasted?

Mr. *Kensy*. I ask'd him how many Weeks he had fasted before he came to my House? He pretended

tended to be dumb, but he counted ten Fingers; I ask'd him how long he had fasted at at my House, he counted two more: I ask'd him whether he had fasted twelve Weeks then? and he made Signs of Twelve.

Elizabeth Baker, Mr. Kenf's Servant, was sworn.

Eliz. Baker's

She depos'd that *Hathaway* was brought to her Evidence, to Master's, and that her Master feign'd a Quarrel the same Evening with her, and she supply'd *Hathaway* with Meat and Drink, as her Master had testified; and ad-

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ded, that once she fetch'd him a Glass of Brandy, and a Child being with her, he refus'd to drink it, pointing to the Child; so she stood between him and the Child, and then he drank it. That at another Time she gave him a Bottle of Stout, after he had eat a Plate of Fish, and she told him it was her Birthday, and he must drink her Health; and after he had drunk it, he pointed to his Forehead, signifying it had got into his Head: And about two Hours after was very merry, and danc'd about, and plaid upon the Tongs.

Mr. Coniers. Did any of the Neighbours see him eat?

Several of the Neighbours see him eat.

Baker. The 11th of November we had a Shoulder of Veal for Dinner, and my Master bid me set by some for him, and he wou'd have some Gentlemen to see him eat it. They were accordingly hid in the Buttery and Cole-hole; and *Richard Hathaway* was brought down, and he took his Bread and Meat and eat heartily, and drank with it. There were Mr. Collet, Mr. Norbury, Mr. Page, and Mr. Stanton, who saw him eat.

Mr. Serj. Jenner. All this is of what was done after the Trial: This Evidence ought not to be given: The Record bears Date the first Day of the Term, and all this is said to be done in November.

Evidence after the Date of the Information allow'd.

L. C. J. It is an Evidence to prove his pretended Fasting before was a meer Deceit; for if his Fasting the last two Weeks be prov'd to be a Fraud, it is strongly to be infer'd that his pretended Fasting ten Weeks before was so too.

Mr.

Mr. Stanton was sworn.

Mr. Coniers. Was you at Mr. Kensy's House to see *Richard Hathaway* eat?

Mr. Stanton. Yes: Mr. Kensy came to me the *Stanton's Evi-*
 11th of November, and desir'd me to come to his dence, of the
 House, to see whether he eat or drank, or not; and Defendant's
 I went, and was put into a dark Place, and I saw eating.
 the Victuals before he was brought; there was five
 Slices of Meat, and Bread, and Beer. And he was
 brought where it was, and he look'd about him
 earnestly, to see if any one saw him, and then he
 fell to, and eat as heartily as any Man could, and
 hearing a Noise whilst he was eating, he ran away
 with it, and set it on the Dresser. The Maid said,
 There is no Body coming; and then he went to it
 again, and eat it up, and drank the Drink, and sat
 down by the Fire; and afterwards we went to him,
 and carried a Bottle of Drink with us, and drank
 to him; but he made Signs that he cou'd not
 drink, and shew'd us that his Belly clung to his
 Back.

John Hunt was sworn.

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He depos'd, that he watch'd with *Hathaway* one *Hunt's Evi-*
 Night, and he pretended to Vomit Pins, but they dence, con-
 were bright and clean, and he thought he only put cerning the
 them out of his Mouth: That the same Night the Noises and
 Company fancied they heard a strange Noise; but the Charms:
 he found it to be only what *Hathaway* made with
 his Feet: And that his Mistress *Welling* sew'd three
 little black Bags to his Shirt, in which, she said,
 were Charms, and he us'd to be much the better for
 them.

Elizabeth Brand depos'd, That several Sums *Brand's Evi-*
 of Money had been gather'd for *Richard Hatha-* dence of Mo-
 way, and particularly, against *Guildford-Affizes*, ney gather'd
 she went about with others, and they gather'd be- for the Defen-
 twixt Six and Seven Pounds; which they paid to dant.
 Mrs. *Welling*, to bear his Charges.

Matthew Ships was sworn.

He depos'd, That *Hathaway* was brought from
Guildford-Affizes to the *Marshalsea*, and that he
 was in his Custody four Days, and that he eat and
 drank, and slept very well, during that Time.

625.
His Defence.

Serj. Jenner opened the Evidence for the Defendant, and observ'd, That great part of the Evidence that had been given against him, was Hearsay, of which no Notice was to be taken. That he cou'd not think there was any Irreligion in saying there were Witches in the World, and that this Man had lain under such a Distemper, that no Doctor knew what to do with it. And that as to his Fasting, they shou'd prove he was put under the Care of very substantial Persons, and that he did not eat or drink for three Weeks or a Month, that it wou'd appear to be no Contrivance, and that their Endeavours had been only to procure Ease; and to this they wou'd call twenty Witnesses.

L. C. J. Let them all be call'd: Call as many as you will.

Anne Eaton was sworn.

Eaton's Evidence of the Defendant's Fasting.

She depos'd, That about two Years ago she look'd after *Richard Hathaway*, for nine Weeks; that she was with him constantly at Nights, during that Time, and that she has been with him four or five Days and Nights together, and did not see him eat or drink; and that whenever she had Occasion to go out, she left some Neighbour with him; that he was some times dumb and blind, and his Senses gone, and he seem'd to be dead, and when he came to himself he burn'd like a Flame of Fire.

Gibson was sworn.

626.
Gibson's Evidence of the Defendant's Fits.

He depos'd, That he saw him at his Master's about two Years ago, that he foam'd at the Mouth, and had strange Motions, throwing himself backward and forward, that he thought he cou'd not live till Morning, and once he thought he had broke his Neck: That he saw him about half a Year afterwards, and he was blind and dumb: That another Time, on a *Sunday*, he was going with him to hear Dr. *Pead*, and upon the *Bridge* his Face was strangely drawn and distorted, and he lost his Speech: And that he saw him in the Hospital, and he went almost double.

Flum-

Flummary was sworn.

Flummary. After *Guildford* Assizes I went to *Flummary's*, as see him, and he was like a Stock or a Stone, blind to his being and dumb, but his Eyes stood wide open.

L. C. J. How could you know he did not see dumb.

Flummary. I tried him: I wagged the Hair of his Eye-lids, and put the Candle to his Eyes, and tried him with my Finger, and he took no Notice of it; his Eyes wou'd not wagg.

Anne Pearse was sworn.

She depos'd, That she belong'd to the Hospital *Pearse's* Evildence of his when *Hathaway* was there, that he went upon his Ankle, and was very weakly; that he lay seven Fast, &c. or eight Days and did not eat or drink; that he in the Hospi- complained he could not go to Stool, and the tal. Doctor gave him Quick-silver, and it did not come 627. from him a great while, and that all this time his Eyes were set in his Head.

Mr. Broderick. When he was recover'd out of those Fits, did he pretend he was bewitch'd?

Pearse. No, I did not hear of that; he remain'd in the Hospital about five Months.

Smith, the Apothecary, appear'd.

Mr. Serj. Jenner. Were you acquainted with *Hathaway's* Condition?

Smith. Yes; I have done Business for the Family several Years; about five Years ago, when he came first to his Master, I found him much afflicted with Convulsion-Fits; and about two Years ago, he was in a very strange Condition, he lay struggling and striving, and sometimes like a Man that was dead; and once, when he was in that Condition, I laid Cupping-Glasses to him, and that enliven'd him. *Smith's* Evildence, as to his Fits.

L. C. J. Do you think a Man might not counterfeit in such a Case?

Smith. Without doubt it may be counterfeited.

L. C. J. Do you think, if he were in a real Convulsion, Cupping would enliven him?

Smith. Sometimes it may be so.

Willoughby, as
to his bark-
ing.

Elizabeth Willoughby appear'd.

She depos'd, That she saw *Richard Hathaway* lie over the Hatch of the Door, and his Breath made a Noise like the barking of a Dog, and she believ'd he was bewitch'd, for she was in the same Condition, when she was a Girl, herself, and flew over Peoples Heads.

L. C. J. You say you were in the same Condition, and flew: Did you fast too, and did you scratch the Witch?

Willoughby. I had no Power to do any thing, I flew over them all.

628. *Mr. Coniers*. What Condition was this Man in?

Willoughby. Night and Day he has lain over the Hatch, and over the Bed, and made a great Noise with his Breath, like the barking of a Dog.

Keeling was call'd.

Keeling and *Bridges's* Evidence, as to his fasting 9 Days. He depos'd, That he watch'd with *Hathaway* nine Nights, and that he neither eat nor drank, nor had a Stool in all that Time; that another watch'd him a Days, and as the Deponent came out, the other was let in.

Bridges was call'd.

He depos'd, That he watch'd with him the same Days that *Keeling* watch'd with him in the Nights, in an old empty House, by a Dock on the back-side, in *St. Mary Overy's* Parish, where the Masters of the Parish had put him, that he did not see him eat or drink in all that Time; and that he never stir'd from him till the other came in.

Mr. Webb sworn.

Webb's Evidence, as to his Vomiting Pins and Fast-ing. He depos'd, That *Hathaway's* Master desir'd him to speak to the Masters of the Parish about his Man: That he did speak with them, and they said they wou'd not trouble the Parish about it, but four or five of them agreed to spend their Crown a-piece, and put him into that empty House, that they search'd all his Cloaths for Pins, when they put him in, but found none; that the Deponent went to see him, and he Vomited several rusty Pins, and four particularly were so join'd together, that he thought it beyond the Art of Man to do it, and that he did not eat or drink all the Time he was there,

there, that on *Sunday* a Gentleman came and desir'd *Hathaway* to go to Church with him, which he did; and that the Gentleman gave him a Pint of Ale, but he did not drink half of it.

Keeling and *Bridges* were Examined again; and affirmed, that he had no Company came to him, or ever went out, but that *Sunday*, but that he lay in a lower Room, which had a Casement in it; and they affirmed that they never slept all the Time they watch'd with him.

Dell sworn.

Mr. Serj. *Jenner*. What do you know of *Hathaway*? 629.

Dell. I was one of the three Men that watch'd *Dell* and *Benn's* with him the Night before: he was had before Sir *Thomas* Evidence of *mas Lane*, he went to Stool, and in his Excrements the Pins found there was a Lump of Hair, loose Pins, a stump of in his Excrements a Nail, half a Nutshell, and two or three pieces of ments. Stone; we had two Chamber-Pots, and these Things were in the first Stool, in the second there was nothing. He lay in a sad Condition, as if he were dumb, and if he was not, he is the greatest Villain in the World.

Mr. *Benn* was call'd.

He depos'd, That he watch'd with him too, and that he was sure those Things came from him, and were found in his Excrements, as the last Witness depos'd.

Powel call'd.

He depos'd, That *February* was Twelvemonth, *Powel*, as to he went to see him; and he lay as one dead, and did the Pins. not wag his Eyes, and presently after he hook'd his Neck in such a manner as he thought he had broke it; that he took the Foam from his Mouth, and in it were five rusty crooked Pins.

Mrs. *Davenport* was call'd.

She depos'd, That Dr. *Hamilton* committed *Davenport's* *Hathaway* to her Care, to see if he Fasted, as he Evidence of his pretended, that she had him in her House seventeen Fasting 17 Days, and that she her self, her Son, or some other Days. of her appointing, watch'd him constantly all the Time, and that he neither eat nor drank; and that to prevent any Deceit, by the Doctor's Directions.

the bought a Bed for him, and had all his Cloaths search'd when he came under her Care.

630.

Others to the same Effect.

Mrs. *Walker* was sworn. She depos'd, That she watch'd with him one or two Nights, at Mrs. *Davenport's*, and that he neither eat nor drank.

Mrs. *Dorman* was sworn.

She depos'd, That she watch'd with *Hathaway* at Mrs. *Davenport's*, two Nights of the seventeen; and every Day he was there, and that he neither eat or drank, but that he made Water, and she believ'd five times more than he took.

Mrs. *Dean* was sworn.

She depos'd, She sat up with him two of the Nights, and that Mrs. *Davenport* sat up with her, and that he did not eat or drink while she was there.

The Lord Chief Justice ask'd Mrs. *Davenport*, Where her Son was, that watch'd him? And she said, He had been gone to Sea about a Week.

Dr. *Hamilton* was sworn.

Dr. *Hamilton's* Evidence, as *was Lane's* when *Hathaway* was Examn'd, he to his Fasting, search'd his Mouth and Throat, and saw nothing amiss, that he perceiv'd there was nothing to be depended on but his Fasting; as for his Vomiting Pins, and the rest, it might all be perform'd by *Le-gerdemain*, and he suspected him to be an Impostor; that he told *Hathaway's* Master, if he thought fit he would lock him in a Room a Fortnight, and see if he counterfeited; that the Master afterwards came to him, and desir'd him to make the Experiment; whereupon he committed him to the Care of Mrs. *Davenport*, and desir'd her to strip him, and see he had no Bread about him, and to send to *Long-lane* and buy new Things for him to lie on, &c. that he order'd her to let no Body to come to him, and that one or two of the Family shou'd sit up with him every Night; and she promised she wou'd. They sent him word, he had strange kind of Motions; but he depended on nothing but his Fasting. That he had heard of many that had Fasted many Weeks, but they had taken Water, or some such Thing

Thing which tho' they are very weak Things, yet may keep one alive, but none can live without taking something: That he saw this Man several times while he was at Mrs. *Davenport's*, and he cou'd not believe but that he had eat, because his Pulse were strong.

L. C. J. Do you think it possible in Nature, or can all the Devils in Hell help a Man to fast a Fort-night? 631.

Dr. Hamilton. I think not, and that made me to suspect him.

Mr. Phipps. Do you think the Pulse of a Man can be strong when he has fasted eight Days?

Dr. Hamilton. I think not.

Sir Thomas Lane was sworn.

Lane. It was above a Twelvemonth ago, his Master brought a Woman before me, upon Suspicion she had bewitch'd his Man; he told me he had been six or seven Months in the Hospital, had fasted above eight Weeks, and voided and vomited Pins; and two Witnesses swore to Chains of Hundreds of Pins that came from him in his Excrements. They fancied scratching *Sarah Morduck* wou'd give him Relief, and were earnest with me I wou'd command the Woman to be scratch'd; I refus'd it, and said, if I shou'd order this, it wou'd be an Assault, but if she wou'd consent, he might do it: She said if she might be secur'd for the future, she wou'd let him; and gave her Consent: As soon as he had scratch'd the Woman, he had Bread and Cheese brought him, and he eat prodigiously, and drank off a Quart of Drink at a Gulp. I ask'd Mrs. *Morduck*, and her Friends, if they ever knew this Fellow got any Money by these Tricks? And they cou'd not tell of any: So that there appear'd to me neither Profit nor Revenge in the Case; and I thought he cou'd not be such a Fool to pretend all this for no End, and run the Hazard of being whip'd.

L. C. J. The Question is not, Whether he shall be punish'd for a Fool, but whether he be a Knave? and whatever Punishment he may suffer, if Convicted, does not belong to you to determine.

The TRIAL of

Anne Eaton examin'd again.

She depos'd he had fasted thirteen Weeks, but being ask'd if she watch'd with him all that Time; she said she watch'd him sometimes by Night, but not by Day.

Heycock was sworn.

Heycock, as to his Fits.

He depos'd, That he saw *Hathaway* since the last Assizes, and that he was blind and dumb, and his Eyes were ready to start out of his Head: And one Time four or five Men could not hold him in his Bed, tho' at other Times he had not half the Strength of a Man.

Spurling sworn.

Spurling's Evidence of the Defendant's being bewitch'd.

Spurling. I went to see *Hathaway* three Times, while he was at Mrs. *Davenport's*, because I heard he was under a supernatural Power.

L. C. J. What do you think that was? Was it an infernal Power?

Spurling. A diabolical Spirit.

L. C. J. Did you ever hear the Power of a diabolical Spirit describ'd?

Spurling. But I suppose those that are under Witchcraft, are under such a Spirit.

L. C. J. But can a diabolical Spirit enable a Man to fast forty Days?

Spurling. I can't tell that, I was acquainted with one that was under a supernatural Power, and was in such a Condition as this Man was.

L. C. J. Did he fast too?

Spurling. I know not that.

L. C. J. I never heard that the Devil ever made such a bold Attempt.

622. Then my Lord Chief Justice *Holt* summ'd up the Evidence, and observ'd to the Jury, As to The Chief Justice's Observations on the Evidence.

633.

Hathaway's being reliev'd by scratching the Woman he imagin'd had bewitch'd him, that he did not know any Rule, either in Philosophy or Divinity, that cou'd induce a Man to believe, that wou'd effect his Cure, if his Distemper had been real: That as to his having fasted so long a Time, that of our Saviour's fasting forty Days, is mention'd in Scripture as miraculous, and an Effect of Divine Power, being

being one Evidence of the Truth of the Christian Religion; and that none cou'd imagine that without such Assistance a Man cou'd fast forty Days, or above, and yet continue in Health: That all the Witches in the World, or all the Devils in Hell cou'd not invert the Order of Nature, and enable a Man to fast beyond the usual Time that Nature will allow: And that if the Thing be impossible, and this Man had endeavour'd to make the World believe he had fasted so long a Time, it was most evident he was a Cheat, and he must contrive to have *Vi-
t*uals some way or other secretly conveyed to him, of which the Impossibility of his being able to fast so long, was a Demonstration: That it was plain the Man had counterfeited, during the Time he was at Mr. *Kensley's*, and tho' that particular Time be not laid in the Information, yet it is a Continuance of the Time that is laid therein, and if he was an Impostor, by pretending to have fasted while he was at Mr. *Kensley's* House, he left them to consider whether he was not so all the while before: He remembered that his scratching and drawing Blood of a strange Woman instead of *Sarah Morduck*, did seem to avail him as much as if he had scratch'd her, until he understood he was impos'd upon: And upon the whole, If they did not believe he was *non Compos mentis*, or under any Delusion, but had endeavour'd to impose upon the Magistrate and the World, by counterfeiting these Infirmities, then there was all the Reason in the World to find him Guilty.

634.

The Jury consulted, and without going from the He is Convi-
Bar brought him in Guilty. l. sted.

An Information was brought against *Richard Hathaway*, *Thomas Welling*, and *Elizabeth* his Wife, and *Elizabeth Willoughby*, Wife of *Walter Hathaway*, his Willoughby, for a Riot and Assault, &c. upon *Sa-
rah Morduck*, Wife of *Edward Morduck*, on the 25th of September, and the 11th of February, in the Twelfth Year of the late King *William*. To which the Defendants pleaded, Not Guilty; and Issue was joind thereupon; and the Trial came on

at

at *Surrey-Affizes*, held in the Borough of *South-wark*, 26 March, 2 Anna 1702.

635. Upon the Evidence it appear'd, That on the said
The Evidence 25th of *September*, *Richard Hathaway* came to
against them. the said *Sarah Morduck's*, as she was opening her
Window, and being behind her, scratch'd her Face,
in a cruel Manner, forc'd out one of her Teeth, and
carried away part of her Cloaths, and that on the
11th of *February* following, one *Thomas Osborn*,
Thomas Hatton, with four other Persons, came in
Diguise to the said *Morduck's* House, and forc'd
her out, and carried her to the House of *Thomas*
Welling, one of the Defendants, and that there the
said *Richard Hathaway*, by the Encouragement of
the said *Osborn* and *Hatton*, and the rest of the
Company, did again scratch her in a most barbarous
Manner: That afterwards *Elizabeth*, Wife of the
said *Thomas Welling*, fell upon her and scratch'd
her Face, and tore off her Headcloaths, and Hair;
and then the said *Thomas Welling* gave her two or
three Kicks on the Belly, and threw her on the
Ground, and stamp'd upon her, and cast her into
the Street, and she was so much bruise'd, that she
was forc'd to keep her Bed a Fortnight. That *Eli-*
zabeth Willoughby, another of the Defendants,
came, with a great many Persons, to the said *Mor-*
duck's House, and that the said *Elizabeth* gave her
several Blows with her Fist, and wou'd have pull'd
her out of her House, for the Defendant *Hathaway*
to scratch her, who stood at a Corner hard by, but
was prevented by one *Sarah Hall*: And that in the
Month of *September* aforesaid, as the said *Sarah*
Morduck was going into *Newgate-Market*, one
Hopkins crying out, *There goes the Old Witch*, a
great Company of People, in a riotous Manner,
flock'd about her, and threatned to throw her into
a Horse-pond; and that if she had not got into an
Alehouse, by the Assistance of some Women there,
636. she had been murder'd: And that in *Easter* or *Whit-*
son-Week last, one *Jones* was apprehended for a
Riot, by him and others committed in one *Barret's*
House, in *London*, endeavouring to forcethemselves
into the said *Sarah Morduck's* Chamber, that the

De-

Defendant *Hathaway* might scratch her, and that the said *Jones* was carried before Sir *Thomas Lane*, who discharg'd him, saying there was Cause enough for the Riot.

The Jury withdrew, and soon after return'd, and brought all the Defendants in Guilty. They are all Convicted.

MEMORANDUM.

THE 28th of February, 2 Anna 1703, *James Bouchier* at-
Bouchier, Gent. was Arraign'd at the Queen's-tainted for
Bench-Bar, For that, since the 11th Day of Decem- going into
ber, 1688, he went into France, without License, France, and
and return'd, since the 14th of January, 1697, returning
without License under the Privy-Seal, either from without Li-
the late King *William*, or Her Majesty. cense.

He pleaded Guilty, and receiv'd Sentence of 637.
Death, as a Traitor.

The Arraignment of DAVID LIND- 638.

SAY, for High-Treason, the 19th
of April, 4 Annæ 1704.

THE Indictment sets forth, That the said Da- The Indict-
vid Lindlay, being a Subject of the late ment, for go-
King *William*, and now of Her Present ing into
Majesty, after the 11th of December, 1688, viz. France, and
the 26th of March, 1689, was in the Kingdom of returning
England, viz. in the Parish of St. Martins in the without Li-
Fields, in the County of Middlesex, and after- cense.
wards, and before the 3d Day of December, 1697;
viz. the 1st Day of October, 1696, he did volun-
tarily go into France, without License either from
the late King *William*, or the late Queen *Mary*,
and that on the said 3d Day of December, 1697,
he

he was not within the Dominions of the late King William, and that not weighing the Duty of his Allegiance towards our Sovereign Lady the Queen that now is, did, as a false Traitor, after the 14th Day of January, 1697. viz. the 10th Day of December, in the second Year of the Reign of her now Majesty, traiterously return and come into this Kingdom of England, viz. in the Parish of St. Martins in the Fields, in the County of Middlesex, without License from the late King William, under his Privy-Seal, or from her now Majesty, under her Privy-Seal, against the Duty of his Allegiance, &c.

639. The Prisoner desir'd Council; and Mr. Williams and Mr. Raymond were assign'd him. Then he pleaded, Not Guilty.

The Trial
comes on.

His Trial came on the 24th of April, 1704. The Jury were sworn, the Prisoner making no Challenges.

Mr. Morley open'd the Indictment.

Lindsay. I shall give your Lordship as little Trouble as may be. I shall only beg leave to state my Case truly, and then I shall submit to your Judgment.

No Confessi- L. C. J. If you had a mind to confess, you on admitted, shou'd have done it before; now the Jury are to en- after the Ju- quire whether you are Guilty or not.

ry are char- Mr. Williams. My Lord, his Intentions may be, ged with the as to some Things, to save the Time of the Court, Prisoner. and perhaps to ease the Queen's Council of some

640. Trouble.

L. C. J. Let the Queen's Council state the Evidence first, and then it may be proper for him to say what he will.

Sir Tho. Powis. That which we have to charge and prove upon the Prisoner is, That he was here in England after the 11th of December, 1688. viz. the beginning of March, 1689. that he went into France in October 1696. and that he afterwards return'd into England, in December last. We say, he went into France without License, and return'd without License. If he does not admit these Facts, we shall call our Witnesses to prove them upon him.

Lindsay

Lindsay. My Lord, I do confess, that being a Native of *Scotland*, and never having had any Office in *England*, I did go into *France*, without His Majesty's License, after the Time mentioned in the Act; and I did continue beyond Sea, till I was inform'd that Her Majesty, by her Proclamation in 1702. gave a General Pardon to all her Subjects; whereupon I came into *Scotland*, and presented myself to the Government, and had the Benefit of the Queen's Proclamation allow'd me, and I was advis'd by some eminent Council there, that I was as free to come into *England*, as any other Subject; and having my Wife and Children here, I came to *London*, by way of *Berwick*; therefore I conceive I am not Guilty of Treason, within the Intent of the Act, and desire to be heard by my Council.

Confesses the Facts, but that he return'd into *Scotland* on a Proclamation of Pardon there.

L. C. J. Did you go into *France* from *England*, or *Scotland*?

Lindsay. From *England*.

L. C. J. Do you admit that he did go into *Scotland* on the Queen's Proclamation?

Mr. Attorney. As to that Fact, we cannot admit it: But the Proclamation gives no License to come into *England*, only a general Pardon. If he will shew us the Proclamation, and it be the same that I have, I will allow it.

The Proclamation was produc'd, and *Mr. Williams* desir'd it might be read.

Sir Tho. Powis. We wou'd not have it look'd on as a Thing of Right to be read, without further Proof.

L. C. J. No, that is of Grace.

The Proclamation was read, containing a General Indemnity for the Kingdom of *Scotland*.

Mr. Raymond. There is a Certificate from the Duke of *Queensberry*, Secretary of State for *Scotland*, that it is a true Copy, on the backside.

Mr. Attorney. We admit it.

Then Proof was made of the Prisoner's being a Native of *Scotland*, that he was a Protestant, and that he was allow'd the Benefit of the Queen's Pardon there.

A printed Proclamation can be read in Evidence, without farther Proof.

641.

642.

Mr.

His Council in-
fist, that the *Northumberland, &c.* and so into *Middlesex*, and
Trial ought to be in the first County in *England* that the Prisoner
first County came into, after his leaving *Scotland*, the Treason,
he came into, if any, was committed there, and we insist, that

643. the Arraignment and Trial ought to be there.

L. C. J. If you insist that the Treason committed was in *Northumberland*, you must prove it.

Mr. Williams. With Submission, it may not be absolutely necessary for us to prove that *Northumberland* was the first County, in regard that your Lordship will take notice that *Middlesex* cannot be the first County; it being impossible to come from *Scotland* into *Middlesex*, without being in other Counties before.

Mr. Attorney. My Lord, we Indict him where we find him.

644. *Mr. Williams.* My Lord, I am of Council for the Prisoner, and we do humbly insist, That the Words in the Proclamation do amount to a License to us to come into *Scotland*, and if so, then we are not guilty within this Act of Parliament, of coming into the Queen's Dominions without License.

That the Pardon in *Scotland* amounts to a License to come thither. And we likewise further insist, That one that has the Queen's License to come into *Scotland*, may, without any farther License come into *England*. The Proclamation pardons all Treasons, and all corresponding and intercommunicating with Rebels, or declar'd Enemies of the Queen, and all other Crimes, of what Nature soever; and it is declared to be as available as if the particular Crime were named, and as if Remissions under the Great Seal were pass'd; and Her Majesty also declares, That it shall be taken in the most favourable and comprehensive Sense that may be, for the Security of the Subject. I admit the Words of this Act are, *If any return into England, or any other of Her Majesty's Dominions, without License under the Privy Seal, it shall be High-Treason.* Now we humbly hope, If the Queen is pleas'd to bestow her License by any Act, or in any Manner equally notorious with her Privy-Seal, 'tis sufficient, and within the Meaning and Equity

Equity of the Statute, and this Proclamation made by all the Heralds at Arms, at the most publick Place in *Edinburg*, is much more notorious and publick, than a License under the Privy-Seal only; besides, the very Words of the Proclamation are, *That it shall be in every Respect as valid and effectual, as if it were under the Great Seal*: Then surely it must be at least as strong as if under the Privy-Seal. Besides, the Statute does not say that the License must be under the Privy-Seal of *England*, and it not being said what Privy-Seal, or of what Kingdom, it must be intended according to the Subject Matter, the Seal of that Kingdom or Dominion where the License is granted; and that being *Scotland*, the License under the Great-Seal of *Scotland* is sufficient; for it seems improper, that the Seal of one Kingdom shou'd be made use of to license an Act in another Kingdom: But 'twill be said, that taking this to be a License, it is only a License to come into *Scotland*, but the Prisoner is indicted for coming into *England* without License. Now this Act, upon Submission, must operate and take its Effect upon the first Step made from *France* into any of the Queen's Dominions: So that if the Prisoner be guilty of Treason, within this Act, it must be when he made his first Step from *France* into *Scotland*, but that being made lawful, by the Proclamation, amounting (as we say) to a License, it can't be afterwards Treason for the Prisoner to come into *England*: And this Proclamation amounts to a Pardon of the Treason, tho' it were before the Prisoner return'd to any of the Queen's Dominions: For both the going into *France*, without License, and returning home without License, must be join'd together to make it Treason, so that the Prisoner, from the Time he went into *France* without License, was an Offender, and consequently capable of a Pardon; and if the Original Offence be pardon'd, all that ensues upon that Offence is at the same Time pardon'd. This seems to be proved by *Cole's Case*, *Plowd.* 401. where, after one had feloniously murder'd another, there came a Pardon of all Crimes and Misdemeanors; and afterwards

The original Offence being pardon'd, all that ensues upon it pardon'd.

terwards the Party wounded died. The Original Misdemeanor being pardon'd, all that ensued upon it was pardon'd, and consequently the Murder, by the Pardon only of all Misdemeanors.

645.

Besides, I wou'd beg leave to offer to your Lordship's Consideration, Whether a *Scotchman*, that was not in *England* at the Time of the making this Act, be within the Meaning of this Act? The Act says, *If any of His Majesty's Subjects shall go into France without License*; this, according to a reasonable Construction, shall be intended only of *English* Subjects, strictly speaking, who were represented by the Parliament that made this Law, and who only can reasonably be suppos'd to have Notice of it.

Treason to be try'd in the County where committed.

There is another Objection, viz. That this Indictment or Trial can't be in *Middlesex*, but in the County whither the Prisoner first came after his leaving *France*, which was *Northumberland*. 'Tis a known Rule, That all Indictments or Trials for Treasons, and other Crimes, must be in the County where the Treason, &c. was committed. 'Tis true

A Felon may be indicted in any County whither he carries the Goods.

indeed, if I steal Goods in one County, and carry them into another, it is Felony (tho' not Robbery) in every County whither I carry them; and the Reason given in *Dyer* 40. and 7 *Coke* 2. is, That the Robbery or Felony does not alter the Property of the Goods: But this depends upon a different Reason, no way affecting the principal Case; for if coming into every County wou'd make a fresh Treason, a Man might be brought to suffer as a Traitor, with many Pardons about him.

647.

Objection that the Prisoner is a Subject of Scotland, and so not within the Intent of the Act.

Mr. Raymond. I beg the Liberty to offer a Word or two on the same Side, for the Prisoner, and shall take leave to insist upon it, That *Mr. Lindsay* can't be call'd one of his late Majesty's Subjects within this Act, I do agree he was the late King's Subject, as King of *Scotland*, but not as King of *England*. This Act being made in *England*, by the *English* Parliament, and using the Word *Subjects*, must mean such Subjects as that Parliament were able to oblige, which are only the Subjects of *England*, or the Dominions depending on the Crown of *England*, but not

not the Subjects of *Scotland*, which is a distinct Dominion from *England*.

I am very sensible, with what Solemnity *Calvin's Case*, in 7 *Rep.* is said by my Lord *Coke* to be adjudg'd, but must beg leave to consider the Foundation upon which this Resolution is built. According to my Lord *Coke* himself, in *Calvin's Case*, Legiance is a true and faithful Obedience of the Subject, due to the Sovereign, for which the Sovereign is oblig'd to protect his Subjects. But this is not a blind Obedience to every arbitrary Command of the Sovereign, but is only such an Obedience as the Law of the Kingdom or Principality has respectively prescribed, for the Subject to pay to his Sovereign. Consequently the Legiance due to the King, as King of *England*, and the Legiance due to him as King of *Scotland*, (since the Laws of both Nations are distinct) must be separate and distinguishable. 648.

And that the Parliament did not intend to concern themselves with *Scotland*, or the Natives thereof, appears by the Preamble of the Act, the Words are, *That upon the Conclusion of the Peace, it was become necessary, for the carrying on a Trade between England and France, that the Subjects of each Kingdom should have, &c.* Now if a *Scotchman* should be taken to be a Subject of the King of *England*, I conceive he was never taken to be a Subject of the Kingdom of *England*.

But taking it that Mr. *Lindsay*, tho' a Native of *Scotland*, might be within both the Words and Meaning of the Act, yet I must submit it to your Lordship, Whether this Act cou'd bind him, he being beyond Sea, viz. in *France*, at the Time when it was made. I agree that every *Scotchman* resident here, is bound by all the Laws of the Land, and so are all Foreigners whatsoever, who live here under the King's Protection. But as soon as they are gone out of the Kingdom, their Allegiance, which was but local, ceases, and they are no longer oblig'd by the Laws of *England*. It must be agreed that no *English* Act of Parliament can bind *Scotland*, nor, as I humbly apprehend, the *Scotch*; Whether a *Scotchman* out of *England* be bound by an Act of the *English* Parliament. 649.

whilst out of *England*. And if so, then how cou'd the Prisoner be bound by this Act, being a *Scotchman*, and out of this Kingdom when the Act was made. Suppose it were enacted, That if a *Dane* shou'd land in *England* without License, he shou'd be a Traitor: And a *Dane*, notwithstanding, shou'd come into *England* without such License? with Submission not. Such Act might amount to a Prohibition of his coming, and he might be us'd as an Alien Enemy, 7 Co. 6 B. as *Perkin Warbeck* was in *Henry* the VIIth's Time; but cou'd not make him a Traitor, because he ow'd no Allegiance to the King, or Subjection to the Law, at the Time when the Act was made. As to the Prisoner's having been in *England*, and resided here, that I think will make no Difference, because his Subjection to the *English* Law ceased, as soon as he step'd off from the *English* Shoar.

Objection,
that he re-
turn'd into
Scotland.

I beg leave further to insist, That this Evidence don't maintain the Indictment. The Indictment is, For returning from *France* into *England*; and the Evidence is, That he return'd out of *France* into *Scotland*, and from thence into *England*. The Act says, *That if any of His Majesty's Subjects, &c. return into this Kingdom of England, or other His Majesty's Dominions.* The Meaning of which we take to be, That the first coming of any such Person, into any of His Majesty's Dominions, shall be the Treason, and that the Act did not intend to make every several coming, into every distinct Dominion, a new Treason; for if he has a License to come into one, 'tis to be believ'd, with a great deal of Reason, he may be trusted in any other of Her Majesty's Dominions. And if the coming into *Scotland* was the first and only Treason punishable by this Act, then we must offer the General Pardon of *Scotland* in the Prisoner's Excuse. For tho' generally speaking, when an *English* Act mentions the Great-Seal or Privy-Seal, it must be took to be the Great-Seal, or Privy-Seal of *England*: Yet in this *English* Act, if your Lordship will construe the Words, *His Majesty's Subjects*, not only to be his Subjects as King of *England*, but as King of *England*

land or any other Nation, by Parity of Reason the Words Privy-Seal ought to be extended to all the Privy-Seals the King has, as King of *England*, or King of *Scotland*. And if so, then since the Queen has in her Proclamation declared that her Pardon shall be taken as beneficially as if it had been under the Great-Seal, (and the Great-Seal includes the Privy-Seal, and is of greater Efficacy) we humbly hope it will be as beneficial to the Prisoner; nay, rather more, because as to *Scotland* it pardons the Offence; for tho' the Return is after the Pardon, yet it pardons the going into *France*, which is the Foundation of the Crime, and without which the returning into *Scotland*, or any of His Majesty's Dominions, was no Offence. This is the Use the Prisoner wou'd make of this Pardon. I can't press it as a Pardon of an *English* Crime, tho' it seems something strange that Mr. *Lindsay* shou'd, by virtue of this Pardon, be a very good Subject of the Queen's in *Scotland*, and have all the same Liberties other of his Countrymen have there, and yet shou'd be a Traitor against the Queen here in *England*: That he shou'd be within the Queen's Protection there, and out of her Protection here: And yet at the same Time, that his Allegiance to her can't be sever'd, (according to my Lord *Coke*, in *Calvin's Case*) nor he considered as a Subject to her as Queen of *Scotland*, and not as Queen of *England*.

Sir *Tho. Powis*. It must be own'd, that a great Objections and deal of that which has been said might have answered by the tried Weight with it, if it had been pleaded in *Scotland*, where the Proclamation was made; but to make Use of it here in *England*, as having any Force in this Case, is not agreeable to Law or Reason: For it is a Pardon of another Kingdom, for Offences committed against the Crown of *Scotland*, whereas this Indictment is for an Offence committed against the Crown of *England*. And, Secondly, it was granted at a Time precedent to the Time of this Offence committed. As for the Words of the Act not extending to a Native of *Scotland*, we need do no more than read them, to make it appear

651d

The *ARRAIGNMENT* of

otherwise. It says not, *Any of the Subjects of the Kingdom of England*; but, *If any of His Majesty's Subjects*; so that whoever was a Subject of the late King's, is within the Act: And they wou'd do little Service to the Subjects of *Scotland*, to overthrow *Calvin's Case*, which was so solemnly determin'd near 100 Years ago, which enables them of *Scotland*, to come into *England* and enjoy the same Privileges here, as the Subjects of *England* do; certainly, as they are let into all these Benefits by the Resolution of that Case, so they are at the same Time the Subjects of the King or Queen of *England*: And since the Mischief of a *Scotchman's* returning was equal with that of an *Englishman's*, consequently they are not only within the Words, but the Meaning of that Act: It's true, we can't by an Act here bind them in *Scotland*, but we are not now putting in Execution this Act in *Scotland*, but putting it in Execution here in *England*, upon a *Scotchman* that had been long an Inhabitant here before. As to the Indictment being laid in a wrong Place, if this Objection wou'd hold, it wou'd render it impracticable to prosecute any one for this Offence; it being impossible to know where a Man first privately arriv'd: But we say, wherever he is found in *England*, there the Indictment may be laid against him, and the Case of the Felony comes home to this Point, the Man that steals Goods in one County, may be indicted in any other County where he carries them: Upon the whole Matter, the Fact being confess'd, we insist he is within the Words and the Meaning of the Act, and within the mischievous Consequences which are intended to be prevented by it.

632. *Mr. Attorney.* My Lord, we are not to consider this Gentleman, in this Case, as a *Scotchman* absolutely, but as a *Scotchman* here in *England*, the Question is, Whether an Act of Parliament made in *England* will not bind every Person that is resident here in *England*? Now the Prisoner was resident here in *England*, and went hence into *France*: And by the Law every *Scotchman* residing in *England*, is an *Englishman*, and hath Right to enjoy the

the Privileges of an *Englishman*. This is the Resolution of *Calvin's Case*: I will give but one Instance of this; The Act of Navigation, made 12 Car. 2. requires that the Master, and three Fourths of the Marriners shall be *English*; the Act of the 14 Car. 2. cap. 11. declares, That any of Her Majesty's Subjects of *England, Ireland, and the Plantations*, shall be accounted *English*, and no others. Now the Natives of *Scotland* inhabiting in *England* or *Ireland*, have always been allow'd to be *English* or *Irish* within that Act, and have enjoy'd the Privileges ever since of being Masters of Ships: So that to all Intents and Purposes, a *Scotchman* being in *England*, enjoys the Privileges of an *Englishman*, and is a Subject of the Crown of *England*. And as to what they say, that his Offence was going into *France*, that is but the Description of the Person, it is his returning from *France* to *England* that is the Offence; and it is not his returning to *Scotland*, but returning to *England*, or any other Her Majesty's Dominions, bound by the Acts of Parliament made in *England*. And as to the Objection, That the Act cannot bind the *Scots* here, because they have no Representative in Parliament; that is not so, for they may be Freemen of Corporations, and are capable of being Freeholders, and as such may be represented in Parliament.

And as to what they insist on, concerning the Place of Trial, the Queen may proceed against him in any County; it is like the common Case of an Escape; an Escape is an Escape, in every County where-ever the Party goes afterwards: And the Party escaped, or the Sheriff, may be proceeded against in any County whither the Party escaped goes, as well as in that whither he first escaped; and without this be so, the Act can never be put in Execution.

Mr. *Lindsay*. My Lord, I think this Pardon reinstates me in all the Privileges I had before.

L. C. J. I tell you, No: It only restores you to these Privileges you had as a *Scotchman*, but exempts you not from any Punishment to which you were obnoxious, by the Laws of *England*: You

ought to consider, that as you are a Subject of *Scotland*, so also you are a Subject to the Crown of *England*, by being a Native of *Scotland* since the Accession of *Scotland* to *England*: And an Act of Parliament in *England* may subject a *Scotchman* to any Penalty, for any Act that he shall do in *England*: And the Prisoner being a *Scotchman* born, and having been in *England* for a long Time, and departing from *England* into *France*, within the Time mentioned in the Act, and afterwards returning into *England*, is to all the Purposes within the Letter and Design of the Act. Another Point that you his Council have urg'd, is, That this Pardon is a License to him to return into *Scotland*, which in Truth it is not; and if it were a License to return into *Scotland*, it will not be a License to return into *England*. As to what you say of the Offence of going into *France* being pardon'd, and therefore the Return can't be High-Treason; to this a plain Answer hath been given you by the Queen's Council, That going into *France*, since the 11th of *December*, 1688, is no Offence originally, but only the Return of such Person is made High-Treason; therefore such a Pardon, even under the Great Seal of *England*, cou'd not have discharged him, if he had returned afterwards.

But he says for himself, That this Pardon has made him a free *Scotchman* to all Intents and Purposes, as if he had never offended, and consequently he has the same Liberty as any other *Scotchman* hath of coming into *England*: It is true this Pardon puts him in the same Condition as other *Scotchmen* are by the Law of *Scotland*; but it puts him not in the same Condition that other *Scotchmen* are by the Law of *England*.

They who are born in *Scotland* may inherit Lands in *England*, but if an Alien be naturaliz'd in *Scotland*, tho' he is to all Purposes a Natural-born Subject of *Scotland*, by the Law of that Realm, yet he is not therefore inheritable to Lands in *England*, as a native Scot may, the Law of *England*.

The other Question that hath been stirr'd, viz. That he shou'd have been indicted in the first *Englifo* County; the Case of an Escape is very apposite to this Purpose: Suppose a Man committed for Felony, has escap'd out of *Newgate* into *Northumberland*, may he not be indicted in *Northumberland*? The Prisoner came voluntarily into this County of *Middlesex*, and certainly may be Indicted and Tried here. Indeed if he had been taken in one County, and carried into another County, that wou'd be another Case, because he came there by Coercion.

Mr. *Lindsay*. If I have by my Ignorance offend- 656.
ed in this Point, and if you think my Indemnity in *Scotland* will not avail me, I humbly beg your Lordship will interceed for me to Her Majesty.

Then my Lord Chief Justice directed the Jury, and told them, That the Prisoner was a Subject of the Queen of *England*, That it appear'd he had departed from *England* since the 11th of *December* 1688, and had return'd thither without License under the Privy-Seal; which if they believ'd, they were to find him Guilty, &c.

The Jury withdrew, and in half an Hour re- The Prisoner
turn'd, and brought the Prisoner in Guilty. is Convicted.

And it being demanded of the Prisoner, what he had to say why Judgment shou'd not pass against him? His Council objected, that the Indictment 657.
was not good, because it was not shewn, that at the Time of going into *France*, nor when the Act was made, that the Prisoner was a Subject; and it not being so shewn, to intend the Prisoner then a Subject, is helping the Indictment by Intendment, which cou'd not be; and that there was the less when the Act room for this Intendment here, because the Prisoner was made, was not shewn to be a Natural-born Subject.

Mr. Just *Powel*. A Subject is supposed to be a 658.
Natural-born Subject, unless he be naturaliz'd afterwards; but now he being laid to be a Subject, according to the Act, supposes him to be a Subject then.

Mr. *Raymond*. But must there not be a Distinction between a Subject that owes natural Subjection,

The ARRAIGNMENT of, &c.

and commits Treason, and one that only owes local Legiance.

Mr. *J. Powel*. You might have shewn that when you were upon the Evidence.

Mr. *Williams*. If we have slip'd any thing on Behalf of the Prisoner, which might have been of Service to him, we hope he shall not suffer for any Omission of his Council; and therefore humbly pray, that your Lordship will favour him, and will be pleas'd to hear him for himself.

Mr. *Lindsay*. My Lord, what I have done has been out of Ignorance, and being supported by what other People did; and therefore, my Lord, having come into *England* by my self, I did not come with any Design of Harm, or to do any thing contrary to Law. As I am a *Scotchman*, it is not to be presumed I can understand the Laws of *England*, and therefore if I have done any thing amiss, out of Ignorance, I hope your Lordship will make a favourable Construction of it, and represent my Case to the Queen. And I hope as Her Majesty has afforded me the Effects of her Mercy in *Scotland*, I shall not feel the Effects of her Displeasure in *England*.

L. C. J. shews
the Reasona-
bleness of this
Law.

L. C. J. Your Crime is returning from *France* without the Queen's License, having before gone thither without any License from the late King or Queen: That Law which hath made such your Return to be an Offence of so high a Nature, cannot by any considering *English* Protestant, be thought to be severe; for they who in the Time mentioned in the Act, chose rather to run into *France*, than to stay in *England*, cou'd have no other Inducement, than an Affection to an Interest opposite to the Protestant Religion, and the ancient Constitution of this Kingdom, and the Wisdom of the Nation thought it absolutely necessary to keep them out; unless they shou'd either clear their Innocence, or give Satisfaction by their Repentance, that they were fit to be trusted here. As to these Circumstances you have mention'd to be peculiar to your Case, they are not sufficient to justify your acting contrary to Law. Of what Consideration they may be

be to obtain the Queen's Mercy, falls not under our Cognizance. Our Business is to put the Law in Execution.

Then the Chief Justice proceeded to pronounce the Judgment against him as a Traytor, Pronounces Sentence.

*The Trial of JOHN TUTCHIN, 659:
on an Information for a Libel,
call'd, The Observator, at Guild-
hal, 4 Novemb. 3 Annæ, 1704.
before the Lord Chief Justice Holt.*

THE Information was brought in the Name of The Informa-
the Attorney General, and imports, That tion for six
the Defendant being a daily Inventer and several Libels,
Publisher of false News and seditious Libels, and or Observa-
maliciously designing to traduce the Government tors.
under the Queen's Administration, and scandalize
and vilify her Ministers, did, on the 30th of May,
in the first Year of her Reign, compose and publish
a malicious and scandalous Paper, entitled, *The*
Observator; wherein, *inter alia*, are these Words,
At the same Time we consider the French King's
Success in his Bribery and Corruption, we ought 1:
to lament the sad State of our own Country,
which affords so many Instances of Treachery.
If we may judge by our National Miscarriages,
perhaps no Nation in Europe has felt the Influences
of French Gold more than England: And worthy
it is our greatest Lamentation, that our dear
Country shou'd be weaken'd by Men of mercenary
Principles, when Countries inferior to us, in
Strength and Riches, are secur'd from Attempts
of this Nature, only by the Fidelity of their Peo-
ple. What is the Reason that French Gold has not
affected Holland, as well as England, but that their
Ministry

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Ministry is such, as is intirely in the Interest of their Country, and altogether incorruptible; They prefer Men that are knowing in their Posts, and are active in Business: When in England we find Offices for Men, not Men for Offices; and a Title of Honour gives a Man a Title to a great Employment he is altogether ignorant of. By this, and by preferring of Men by Interest and Favour, has the Excise, the Customs, and other Branches of the Revenue intolerably sunk; and by this Means has the Navy of England, our chief Support, been hitherto perfectly bewitch'd: And can Lewis spend his Money better, than in getting Men into Offices in England, who are either false or ignorant in the Business; or are his Friends.

- That on the 11th of July following, he publish'd another *Observer*, wherein are these Words,
1. And this is a *Prerogative of singular Advantage* to the People of England, in that their Representatives are the Judges of the *Male-Administration* of their Governors, That they can call them in Question for the same, and can approve such to wear the Crown, who are fittest for Government; which they have often done: And indeed, which is the *Privilege of all free People*, who are authorized by the *Laws of God and Nature*, to choose their own Governors.

660. That on the 12th of June, in the Second Year of the Queen, he publish'd another, wherein are these Words, Take one Time with another, the *Mis-managements of the Navy* have been a greater Tax on the Merchants than the Duties rais'd by Parliament. We never had a better Navy, but the *Wisdom of the Managers* is like a bottomless Pit, past finding.

4. That on the 16th of the same June, he publish'd another, wherein are these Words, What avails it a Man of Learning and Parts to qualify himself for the Service of his Country on the Ocean, if he has Knowledge enough to advise Neptune himself? If he has no Interest, he shall have no Preferment. How much does it look to our Nation's Disadvantage, to have Men in eminent Stations in the Navy,

Navy, who have not so much as an Idea, a Notion, a Thought, of Naval Affairs? To have Men superintend the building of our floating Castles, who know not the Nature of any part of the Management? To have Men employ'd in the Victualling, who qualify themselves for that Post by learning to write their Names, which is indeed a Post for a Philosopher bred to the Sea.

That the 10th of July following he publish'd another *Observer*, wherein are these Words, Countryman. Truly, Master *Observer*, I have no very good News for you, Mr. Daniel de Foe has pleaded Guilty to the Indictment against him for writing and publishing, The shortest Way with the Dissenters; and he is sentenc'd to stand three times in the Pillory, to pay a Fine of 200 Marks, and to find Security for his good Behaviour for seven Years. *Observ.* The Court cou'd do no otherwise than Convict him, upon his pleading Guilty; habemus Confitentem reum, is very often the Voice of Courts of Judicature; 'tis the Ease of Judges and Juries. If Daniel de Foe was in Expectation of Coleman's black Box, he has found a Pillory instead of it. I don't trouble my Head about the Custom of giving the Pillory to Authors, which is the Punishment of Bakers. You talk'd just now of turning Author; have a care of your Candle, you see which is the shortest Way with Authors: You must all enter your selves in the Regiment of Col. Foe. The Law of England directs that no Man shall be Fined ultra Tenementum; and I make no Question but the Justice of the Court has Fined Mr. Foe answerable to his Estate: His Security for his good Behaviour for seven Years, without doubt was rationally consider'd, as to the Legality thereof. For my part, I am only acquainted with old Laws of England, the ancient Birthrights and Immunities of English Men: This I take to be the Foundation of new Laws.

That on the 20th of May, 1704. he publish'd another scandalous and seditious Libel, entitled, *The Observer*, in which is contain'd these Words, Countrym. Master *Observer*, there's another Plot

5.

6.

The TRIAL of

Plot against you. Observ. Prithee, Man, there's a Plot against the Queen, and the whole Nation; Is it any wonder then that there are Plots against me? The High-flyers are now plotting against every honest Man in England; I'll tell you more of it the next time we meet. Countrym. I fancy some sort of People plot against you, because you endeavour to countermine their Plots against the Queen and Nation. Observ. You are right enough; but that shan't hinder me from detecting their Designs, and from opening the Peoples Eyes. But prithee what Plot is this? Countrym. Why, Sir, 'tis a Plot preparatory to your Trial, and if they can't effect this Plot, I suppose you'll never be Try'd. They insinuate into the Citizens of London, that you have lately written very scandalously, maliciously, and treasonably; and I don't know how many other Lies, against them the said Citizens; and by this means they are minded to set your Jurors against you. Observ. This is likely enough, they'll leave no Stone unturn'd to suppress the Truth. I understand I shou'd have been prosecuted by Bill the last Sessions, but that the High-flyers did not like the Jury; nay, they say they don't like the the two Sheriffs, because they won't pack Juries to find innocent Men Guilty. To the great Scandal of the Queen and her Government, and against the Peace, &c.

661. Proclamation being made, as usual, for all People to attend, the Jurors were call'd.

Mr. Pinfold desir'd he might be excus'd from being on the Jury, for that he had read some of the *Observers* and publickly disallow'd them, and so it might be thought he was prejudic'd against the Author.

L. C. J. You must not be excus'd, unless the Queen's Council will.

Mr. Montague. We challenge him on Behalf of the Defendant, for that he does not look upon himself as indifferent.

Mr. Sol. They cannot challenge to the Favour in a Case of the Crown.

L. C. J.

L. C. J. It must be a principal Challenge, or nothing; and you shall have my Judgment of it, when 'tis drawn up.

Mr. Att. My Lord, we are unwilling to give you this Trouble; we shall leave it to Mr. *Pinfold* himself.

Pinfold. I desire to be excus'd. *Then he was set aside.*

There being no other Challenges made, a Jury was sworn: And Mr. Serjeant *Weld* open'd the Information; and Sir *Thomas Powis* and Mr. Attorney shew'd the Nature and Heinousness of the Offence: Mr. Attorney observ'd, That *Tutchin* had already been taken Notice of by the House of Commons, and been before the Secretary of State, where he had been admonish'd to take care what he wrote; but he wou'd take no Warning: That in the Papers he was about to be Try'd for, he had taken the greatest Liberty that ever Man did; and that they did not come out privately, as other Libels did, but openly, in Defiance of the Government: That there was not one in any considerable Post, that had escap'd his scandalous Censure; and that he cast the vilest Reflections on all Mankind: And he observ'd to the Jury, That the Matter they were to enquire of was, Whether the Defendant was the Author and Publisher of these Libels? Which if they found, his Punishment was to be left to the Judgment of the Court.

662.

663.

Mr. Attorney shews the aggravating Circumstances this Offence was attended with.

Then Mr. *How*, the Printer, was call'd, and some *Observers* were shewn him.

Mr. Solicitor. Pray acquaint the Court if you know who compos'd or brought these to the Press.

Mr. How. About the latter end of *March*, 1702, *How* the Printer I treated with Mr. *Tutchin* about writing an *Observer's* Evidence to be publish'd Weekly: The first was of his Agreement publish'd in *April*, 1702, and all that have been ment with printed since I had from him, to this Year.

Tutchin for the Copy, &c.

Mr. Att. Was there any Agreement made about the writing of it?

How. It was agreed to write once a Week, at first, and I was to give him half a Guinea for it. I have printed in all about 266, and paid him for them.

Mr. Sol.

The TRIAL of

Mr. Sol. Have you had any Discourse, of the Danger of printing them?

How. He said he own'd himself to be the Author, and bid me not fear, if any Danger happen'd; and said, You are a Rogue to your self and Family, if you don't discover me.

Sir Tho. Powis. See if he deliver'd these very Papers to you?

How. Yes, and he was paid for them.

664. *Mr. Montague, (taking up an Observer.)* Do you remember the printing this?

How. It was printed at my House.

Mr. Mont. Do you keep exactly to your Copy, or do you take the Liberty of incerting and leaving out Words?

How. Sometimes when they have been sent me, and I knew not where to find him, I have alter'd them my self, rather than be disappointed.

Mr. Mont. Then are you sure that Paper is printed without Alteration?

How. I do not remember that.

Mr. Mont. Who put the Title to this Paper?

How. It was agreed between us, to call it, *The Observer*; I don't know but I might write it in the Paper at first, and so it was inserted ever after I propos'd the Title first to him.

Mr. Sol. Have you not publish'd them in Volumes since the first publishing them?

How. He order'd me to bind up three Volumes, and he made a Preface and Index; which I paid him for, and he wrote his Name to the Preface.

One of the Volumes bound up was produc'd in Court.

665. *Mr. Mont.* Where was this Book deliver'd you to be bound up?

How. I can't say whether in *London, Middlesex, or Surry.*

L. C. J. What did you give him for that Preface and Index?

How. I think it was Ten Shillings.

Mr. Mont. My Lord, they cannot read this Paper as the Paper of *Mr. Tutchin*, for we insist upon it, it is *Mr. How's* Paper, for whatever Papers he had

had from Mr. *Tutchin*, were in Writing; and if he be charg'd with a Libel in Writing, they must produce that very Writing, or a true Copy thereof: Mr. *How* says he often alter'd it, according to the best of his Understanding; now by a very small Alteration that may be made a Libel, which was not so before.

L. C. J. Where was the Agreement made for printing the Papers?

Mr. *How*. I am not positive whether in *London* or *Middlesex*.

Mr. *Conyers*. Did he come to *Fenchurch-street* to direct the printing them?

How. Yes, several times.

L. C. J. Have you the Original Papers?

How. Very few of them; I thought there would be no Use made of them.

Sir *Tho. Powis*. Thus if the Author can get but the Copy destroy'd, there can be no Evidence against him, for how can the Printer ever say it agrees with the written Copy to a Letter? We have given a fair Evidence that this was the same that was brought to this Man, and they have not shewn that any thing was added to, or diminish'd from the Papers we produce: And the Printer says, the Defendant avow'd and justify'd all that he printed: And that he directed him to collect all those *Observers* we insist on, into a Volume, and that he own'd them afterwards, and publish'd them.

Mr. *Att.* These *Observers* were printed and publish'd in *London*; and wherever the Agreement was made between them, we may charge the Defendant where the Papers were printed, pursuant to his Agreement, for this makes the Composing and Printing his Act.

Mr. *Sol.* After there were a hundred written, 666
he directed Mr. *How* to bind them up in a Volume, and put a Preface and Index to them, and set his Name to it; this, no doubt, is a Publication and Owning them.

Mr. *Weld*. Did not he allow you to make Alterations?

How.

How. I alter'd a Word now and then to make it Sense: And he has often said, that Printer was a Blockhead that did not.

Mr. Mont. It does not appear that *Mr. Tutchin* ever look'd over the Papers that are here bound up, so that the most that can be made of it is, That *Mr. Tutchin* took this Book to be his Book, upon the outward View of it, or, at best, on the Credit of his Printer. And shall every thing in it be read against him as his? In *Dr. Drake's* Case, who was try'd as the Author of a scandalous Book, it was sworn, That upon shewing him one of the Books, he own'd himself to be the Author: But it being ask'd, If the Book that was shewn him, was the very Book that was produc'd in Evidence? It was answer'd, No: But it was a Book of the same Impression: As I take it, that was not allow'd as Evidence.

L. C. J. That Book was read, tho' it was not prov'd to be that very Book that he own'd.

Mr. Mont. Surely they ought not to read any of these Papers, if they have not examin'd the first Copy sent to the Printer's: And I was in hopes that they wou'd have answer'd that part of my Objection, That these printed Papers are no more than Copies.

L. C. J. It is more than a Copy. Every Copy of a Libel is a Libel; and every Printer of a Libel, is guilty of a Libel.

Mr. Mont. It is true, every Copy of a Libel is a Libel; but whose Libel is it? But, *Mr. How*, can you say he look'd over all the Papers in that Book, and own'd them?

667. *How.* He order'd me to deliver them to my Lord *Nottingham*, about a Week after they were publish'd, which was about *April, 1703*, and I deliver'd them.

Mr. Att. We humbly insist on the reading the printed Papers on the Evidence we have given, which we take to be sufficient to read them without the Book: There are but two that we charge him with in the Book.

L. C. J. Read them both.

Then

Then the Words laid to be in the *Observer* of the 30th of May, 1702, were read, viz.

At the same Time we consider the French King's Success in his Bribery and Corruption, we ought to lament the sad State of our own Country, which affords so many Instances of Treachery. If we may judge by our National Miscarriages, perhaps no Nation in Europe has felt the Influences of French Gold more than England: And worthy it is our greatest Lamentation, that our dear Country shou'd be weaken'd by Men of mercenary Principles, when Countries inferior to us, in Strength and Riches, are secur'd from Attempts of this Nature, only by the Fidelity of their People. What is the Reason that French Gold has not affected Holland, as well as England, but that their Ministry is such, as is intirely in the Interest of their Country, and altogether incorruptible: They prefer Men that are knowing in their Posts, and are active in Business: When in England we find Offices for Men, not Men for Offices; and a Title of Honour gives a Man a Title to a great Employment he is altogether ignorant of. By this, and by preferring of Men by Interest and Favour, has the Excise, the Customs, and other Branches of the Revenue intolerably sunk; and by this Means has the Navy of England, our chief Support, been hitherto perfectly bewitch'd: And can Lewis spend his Money better, than in getting Men into Offices in England, who are either false or ignorant in the Business; or are his Friends.

Then the Words laid to be in the *Observer* of July the 11th, 1702, were read; viz.

And this is a Prerogative of singular Advantage to the People of England, in that their Representatives are the Judges of the Male-Administration of their Governors, That they can call them in Question for the same, and can approve such to wear the Crown, who are fittest for Government; which they have often done: And indeed, which is the Privilege of all free People, who are authoriz'd by the Laws of God and Nature, to choose their own Governors.

In this *Tutchin* says the People may call their Princes to Account, and Depose them.

Then the Papers above were shewn to Mr. *How*.
Mr. Att. Pray tell us who was the Author of these Papers.

How. Mr. *Tutchin*: I had them of him, and paid him for these very Papers.

Mr. Mont. What, these Papers that are now produc'd? You never shew'd them to him; did you?

How. No: But I have shewn him the same Number, and he has own'd them all a hundred Times.

Mr. Att. Did you carry all the original Papers you had to Mr. *Borret*?

How. Yes; all that I had at the Time they were sent for, but I have had some since.

668. *Mr. Borret* was sworn.

Sir Tho. Powis. Acquaint the Court if you desir'd Mr. *How* to look out the Copies of the *Observers*.

Mr. Borret. I sent to desire all the written Copies: And he brought me a considerable Number, and said they were all that he cou'd find: But I cou'd find but one amongst them, that related to the *Observers* mention'd in the Information; and that was in *May* last; which I have in Court.

The Words in the *Observer* of the 12th of *June*, 1703, were read.

Take one Time with another, the Mismanagements of the Navy have been a greater Tax on the Merchants than the Duties rais'd by Parliament. We never had a better Navy, but the Wisdom of the Managers is like a bottomless Pit, past finding.

Then the Words laid to be in the *Observer* of the 16th of the same *June*, were read.

What avails it a Man of Learning and Parts to qualify himself for the Service of his Country on the Ocean, if he has Knowledge enough to advise Neptune himself? If he has no Interest, he shall have no Preferment. How much does it look to our Nation's Disadvantage, to have Men in eminent Stations in the Navy, who have not so much as an Idea, a Notion, a Thought, of Naval Affairs? To have Men superintend

intend the building of our floating Castles, who know not the Nature of any part of the Management? To have Men employ'd in the Victualing, who qualify themselves for that Post by learning to write their Names, which is indeed a Post for a Philosopher, bred to the Sea.

Here Mr. Tanner was sworn; and produc'd the Record of De Foe's Trial, to be compared with the Passage next read; and then the Words in the *Observator* of the 10th of July, 1703, were read.

Countryman. Truly, Master *Observator*, I have no very good News for you, Mr. Daniel de Foe has pleaded Guilty to the Indictment against him for writing and publishing, The shortest Way with the Dissenters; and he is sentenc'd to stand three times in the Pillory, to pay a Fine of 200 Marks, and to find Security for his good Behaviour for seven Years. *Observ.* The Court cou'd do no otherwise than Convict him, upon his pleading Guilty; *habeamus Confitentem reum*, is very often the Voice of Courts of Judicature; 'tis the Ease of Judges and Juries. If Daniel de Foe was in Expectation of Coleman's black Box, he has found a Pillory instead of it. I don't trouble my Head about the Custom of giving the Pillory to Authors, which is the Punishment of Bakers. You talk'd just now of turning Author; have a care of your Candle, you see which is the shortest Way with Authors: You must all enter your selves in the Regiment of Col. Foe. The Law of England directs that no Man shall be Fined ultra Tenementum; and I make no Question but the Justice of the Court has Fined Mr. Foe answerable to his Estate: His Security for his good Behaviour for seven Years, without doubt, was rationally consider'd, as to the Legality thereof. For my part, I am only acquainted with old Laws of England, the ancient Birthrights and Immunities of English Men: This I take to be the Foundation of new Laws.

Then Mr. Borret produc'd the original *Observator* of the 20th of May, 1704, and depos'd, he had it of Mr. How, and Mr. How depos'd,

he had it of Mr. Tutchin; and said, to the best of his Knowledge it was Mr. Tutchin's Hand; then the Words said in the Information to be contained in it, were read.

Countrym. Master Observator, there's another Plot against you. Observ. Prithoe, Man, there's a Plot against the Queen, and the whole Nation; But any wonder then that there are Plots against me? The High-flyers are now plotting against every honest Man in England; I'll tell you more of it the next time we meet. Countrym. I fancy some sort of People plot against you, because you endeavour to countermine their Plots against the Queen and Nation. Observ. You are right enough; but that shan't hinder me from detecting their Designs, and from opening the Peoples Eyes. But prithoe what Plot is this? Countrym. Why, Sir, 'tis a Plot preparatory to your Trial, and if they can't effect this Plot, I suppose you'll never be Try'd. They insinuate into the Citizens of London, that you have lately written very scandalously, maliciously, and treasonably; and I don't know how many other Lies, against them the said Citizens; and by this means they are minded to set your Furors against you. Observ. This is likely enough, they'll leave no Stone unturn'd to suppress the Truth. I understand I shou'd have been prosecuted by Bill the last Sessions, but that the High-flyers did not like the Fury; nay, they say they don't like the two Sheriffs, because they won't pack Juries to find innocent Men Guilty.

Mr. Mont. My Lord, there is a Variation between this Paper and the Information: In this 'tis only C. in the Information it is *Countryman*.

669. L. C. J. When he us'd to write C. were you not to write *Countryman*, at large?

How. At first, we were: Afterwards, as it might be intelligible.

To charge an Author with this Thing sufficiently; for they must shew, that it writing a Li- was writ within the City. In the Bishop's Trial, bel, it must be tho' it was prov'd to be under all their Hands, yet proved where it was requir'd, they shou'd make it appear, that he wrote it. that

that Paper was writ in the County of Middle-

Mr. Att. We have prov'd his owning himself to be the Author, and his causing it to be printed in London. But wherever he directs it to be printed, that is a Publication by him in the County where it is printed.

L. C. J. That is not an Evidence of his writing it in London; and if he be guilty of a Fact in one County, you cannot charge it in another. But if he caused it to be printed in London, no doubt but it will be a Publication here.

Mr. Att. If his owning himself to be the Author, and our proving the Copies to be receiv'd in London be not an Evidence they were writ there first, we can hardly ever prove the Charge of writing. For he that writes a Libel, will do it alone.

L. C. J. Did he write any of them in your House in Gracechurch-street, Mr. How?

How. Not that I know of.

Mr. Montague, in his Observations on the Evidence, in Behalf of the Prisoner, lays, That there can be no Libel, where no certain Person is reflected on or scandaliz'd; and that Mr. Attorney ought to have shewn some particular Persons, either publick or private, that these *Observers* had aspers'd. And to say, the Officers and Ministers of the Queen were particularly concern'd, did but give him Occasion to ask, what Officers and Ministers Mr. Att. was taking care of? For he did not see one Minister of State, or great Officer mention'd, throughout the Record: And since the Information set forth no Particulars, he hop'd the Jury wou'd take it for granted, that nothing in these Papers cou'd be affix'd to any Man's Door: That he hop'd the Jury wou'd distinguish between the written and printed Libels that are mention'd, and take notice, that of the written ones no true Copy had been prov'd: That Mr. Tutchin receiv'd but a small *Præsum* Transcribing for writing once or twice a Week, and that Mr. of a Libel, *How* afterwards alter'd them, as he saw fit, and makes a Man they were printed for his sole Benefit: That admit guilty of a thing the transcribing of a Libel made a Man guilty of Libelling, Mr. How only was guilty of making and publishing them in London.

That as to the first *Observer* laid in the Information, which says, *We ought to lament the sad State of our Country, which affords so many Instances of Treachery*. No Person could say, That at no Time this Country had afforded Instances of Treachery; and the Information did not fix any Time to which the *Observer* alluded, and for want of this, he hop'd the Jury wou'd not much regard them.

That the next Thing charg'd, was, a wicked Assertion, *de Es concernen potestat populi Anglican*; but that there was a manifest Variance
671. between the Charge and the Paper; for the Charge spoke of the Power of the People at large; the Paper, of what our Representatives in Parliament might do; and so he thought that Charge did not affect them, by Reason of this Variation.

Mr. Sol. But *Mr. Montague* passes by what he says of the Peoples Representatives being Judges of the Male-Administration of their Governors, and that they can call them in Question for the same, and appoint such to wear the Crown, as are fittest for Government; which he says they have often done.

Mr. Mont. I am apt to think my Discretion in Argument, of passing it by, will be more easily justified, than theirs who shall bring such points before this Assembly; the Rights of Princes, and the Power of the People, are too high Topicks for me to meddle with. My Lord, the next Article is concerning the Mismanagements of the Navy, which, the Paper says, have been a greater Tax on the Merchants, than the Duties rais'd by Parliament. Now no Body can say we never had any Mismanagements in the Navy.

Mr. Att. My Lord, I think all this Discourse is such as ought not to be allow'd.

Mr. Sol. When the Defendant complains of the Mismanagement of the Government, and afterwards comes and says, *That the People have a Power to call their Governours to Account*: Does this want an Exposition? Does not he possess the People

JOHN TUTCHIN. Anno 1704.

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People with an Opinion, That they have Power to call the Queen to an Account?

Mr. Mont. My Lord, what I was insinuating upon, was, That whatever is here set forth, is not brought within any Compass of Time: That the Things charged may relate to other Times long since, and since this Exception goes to the rest of the Charges in the Information, I shall pass them by, and not take up more of your Lordships Time.

Mr. Att. Gen. My Lord, we have prov'd the Defendant's Agreement with the Printer, and it is not material whether this Agreement was made in London, or out of London; for where-ever that Libel is printed and publish'd, pursuant to the Defendant's Agreement, he is guilty of it: As to it's not being a Libel, because no particular Person is assign'd; I look upon it as the highest Kind of Libels, to reflect on publick Officers in general, as on Ministers of State, Judges, and the like; and I believe every one knows, such Papers are Libels, tho' particular Persons are not named: And surely, those who reflect on the publick Administration by the Queen's Officers, do reflect on Her Majesty, who places and continues them in their Offices. There needs no Averment to explain these, they appear Libels in themselves, and I hope such Discourses as have been made on this Occasion, will meet with no Countenance, and am surpriz'd to hear it justified by Council here, That the People have Power to call their Governors to Account.

Mr. Mont. I did not say so.

Mr. Att. Surely your saying, That you us'd more Discretion in passing it by, than we did in prosecuting the Defendant for it, and that we wanted Discretion in bringing this Matter upon the Stage, cou'd mean nothing else, but that this Matter was justifiable, only you would not in Prudence do it; which is the greatest Liberty I ever knew taken by a Council.

Mr. Mont. I did not say so: I only said, It was more discreet to pass it by, than take notice of it.

L.C.J. I did not hear him say so.

Mr. Attorney's Observations for the Queen 672.

It may be a Libel, tho' no particular Person is reflected on,

Mr. Attorney charges Mr. Montague with justifying Tutchin's Principles, as to the Power of the People.

And says, He shall prosecute any Man who maintains such Doctrine.

673. The Chief Justice directs the Jury.

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674. The Defendant is found guilty of publishing, but not of writing the Observations.

The Defendant's Council move in Arrest of Judgment, for that the *Distringas* was awarded the last Day of Trinity-Term, was Tested the Day after the return of the *Venire*, and so a Discontinuance of the Process.

Mr. Att. I shall prosecute any Man, who asserts such Doctrine: My Station obliges me to take notice of such Discourses as these; which no Council shou'd presume to make.

The Lord Chief Justice in his Directions to the Jury, told them, He observ'd it had been said, that these Papers were innocent Papers, and no Libels; and that nothing was a Libel, but what reflected on particular Persons; but that this was strange Doctrine; and that if People cou'd not be call'd to Account for possessing People with an ill Opinion of the Government, no Government cou'd subsist: And that they shou'd consider if the Words that had been read to them did not tend to beget an ill Opinion of the Administration of the Government; as telling the People, that those who were employ'd knew nothing of the Matter, and those that did, were not employ'd; that Men were not adapted to Offices, but Offices to Men, &c. He said, Tho' it was not prov'd *Tutchin* writ them in *London*, yet there was Proof he sent them to Mr. *How*, in order to print them in *London*, and tho' *How* receiv'd them from him to print out of *London*, yet if he receiv'd them to print in *London*, that was a Publication in *London*: That *Tutchin* knew the Printer liv'd in *London*, and there was a Contract made, and he was paid for them.

The Jury withdrew, and after a quarter of an Hour's Recess, brought him in Guilty of composing and publishing in *London*, but not of writing in *London*.

13 Nov. 1704. The Defendant's Council mov'd in Arrest of Judgment.

Mr. *Montague* said, The Trial ought to be set aside, for that the *Distringas* on which the Verdict was taken, was null and void: He said, the *Venire* the *Distringas* *facias* was awarded the last Day of Trinity-Term, was Tested the returnable, *die Lune prox' post tres septimanas sancti Michaelis*, which was October the 23d, the first Day of Michaelmas-Term, and the *Distringas* which shou'd have issued the same Day, was sued forth the 24th of October, being the Day after the Return of the *Venire*, so that here was a Discontinuance

tinuance of the Process: Another Reason was, That both the *Venire* and *Distringa's* were returnable at a Day certain; and that they ought to be returnable at a common Day, where the Proceedings in Criminal Matters are laid in a foreign Country. But as to the last Objection, it was the Opinion of the Court, they might be returnable either on a Day certain, or a common Day.

As to the first Objection, Mr. Attorney said he believ'd somebody had done it on purpose, and desir'd Time to find out how it had been manag'd.

20 Nov. L. C. J. Mr. Attorney, Will you go on? 675.

Mr. Att. We are ready, if they will maintain their Exceptions.

Mr. Mont. We rely on the first Exception; it lies upon Mr. Attorney to answer it. 676.

Sir Tho. Powis. I wou'd know if the Award of the *Distringa's* is right on the Roll.

L. C. J. There is no Discontinuance on the Roll, for it appears here that the *Distringa's* was awarded the 23d.

Mr. Mont. My Lord, is that the *Nisi prius* Roll, or the Plea Roll.

L. C. J. It is the *Nisi prius* Roll.

Mr. Mont. The Plea Roll has been made right since I took the Exceptions, and the *Nisi prius* Roll ought to be a Transcript of the Plea Roll: To bring the Transcript of a Roll that has been made up since, is not right.

Mr. Just. Powel. The Award is right, but they have not taken out a Writ according to the Award of the Court: Whether that can be warranted?

The Council for the Queen argued, That the *Distringa's* was rightly awarded on the Roll, and that the Roll was the Warrant for the Clerk to make out the *Distringa's*; and if the *Distringa's* was not made according to the Award, it was the Misprision of the Clerk, and consequently amendable, either by the Statutes of Amendments, or by the Common Law.

That before any Statutes of Feofails, there were Amendments at Common Law, both in Civil and Criminal.

Cri,

Criminal Matters, and these chiefly regarded the Process of the Court, and such Errors as were the Inadvertencies and Neglects of the Clerks: For which they cited several Cases out of *Brook* and *Fitzherbert*, *Tit. Amendments*; and also *Blackmore's Case*, in 8 Co. 156 b. where it appears that the original Writ in a *Quare Impedit*, was amended in the Case of the King, and the Word *presentere* made *presentare*, which cou'd not have been done in the Case of a Subject; from whence they infer'd, That Amendments were more favour'd in the King's Suit, than in a Subject's.

But the Statutes they most rely'd on were, the 8 H. 6. c. 12. and c. 15. The first of which impowers the Justices to amend all Defects in Process, &c. (except Appeals, Indictments for Murder, and Outlawries for the same, and Additions left out in original Writs and Exigents, and other Writs of Proclamation;) and the last impowers the Justices to amend any Misprision or Default of the Clerks or Officers in any Records and Processes depending before them, except Process and Records of Felonies and Treasons, and the Dependencies thereof: They said that these Statutes being in general Words, extended to all Cases not excepted, as well Criminal as Civil: But that this would appear more fully by the following Cases, wherein the Judges had amended Discontinuances of this Nature, in criminal Prosecutions at the Suit of the

Books quoted Crown; as in *Harris's Case*, 2 Cro. 502. and the where A- Information against Sir John Carson and his Wife, mendments for Recusancy, 2 Cro. 529. and in the *Quo War-* were allow'd, *ranto* against the Corporation of *Maidstone*, Cro. in Cases of the *Car.* 144. and many other Cases were quoted. Be- Crown.

678. Besides, they said this Exception cou'd have no great Weight, for tho' the Award of the *Distringas* must be upon the Day the *Vacare* is returnable, there was no Necessity that the *Distringas* shou'd be Tested that Day, and that it was proper enough for the Court to award one Day, and the *Distringas* to be made out the next, for some Time there must be suppos'd for the making of it out, after it was awarded; and for this they cited *Cro. Ems.* 572.

But

But they said it needed Amendment, by the Opinion of my Lord Coke, in *Blackmore's Case* any part of the Record is amendable, the same Term, it being in the Breast of the Judges during the Term, altho' Misprisions of Clerks in another Form were not amendable by the Court.

It was argued, by the Council for the Defendants, That our Law-Books made a great Difference where the King prosecuted for his own Civil Rights, and where he prosecuted Criminal Matters in his political Capacity: And they did acknowledge that the Law did indulge the Crown more than the Subject, in the Prosecution of its Civil Rights, but not in Cases where the Subject was to be charged with Crimes and Penalties. That indeed in *Blackmore's*, which was a Civil Case, an Amendment was made, in Behalf of the Crown, which wou'd not have been allow'd in the Case of a Common Person, for no original Writ was amendable at Common Law, in the Case of a Common Person. But that an Indictment or Information never found Favour, beyond, or equal with a Civil Action, that they denied, and said there had been no Authority quoted to warrant such an Opinion. And that there was not one Instance to be found of an Amendment in a Criminal Prosecution: And they argued further, That no Error in the Title of any Process that has issued out of Court, and was return'd back again by the Sheriff, could be amended or alter'd, either by the Rules of the Common Law, or by any of the Statutes of Amendment: That, indeed, my Lord Coke, in *Blackmore's Case*, says, That the Judges, by the Common Law, may amend the Entry of their own Judgment, or any other part of the Record the same Term; but he never said, they might amend a Writ made out, and return'd to an Officer of the Court: For tho' what they themselves do, may be said to remain in their own Breasts till the end of the Term, they did not see how a Writ taken out in pais, and which was never in Court, till brought thither by the Sheriff, could be said to remain in the Breasts of the Judges. That as to the Statute of the 8 Hen. 6. which had been

679.

Arguments by the Defendant's Council, that it could not be amended.

680.

For that there was no Instance of an Amendment in a Criminal Prosecution, and that no Process actually issued out, was ever amended in any Case,

been much insisted on: It was the Opinion of my Lord Coke, that that Statute did not extend to any Process in Pleas of the Crown, notwithstanding the general Words, and that the uniform Opinion for three Centuries, had been, That no Process but what issues in Actions real, personal, or mixed, were within the Meaning of it.

They urged also, That this was not a slip of the Clerk, but an Error in Judgment, for that he advised about the Day the *Districu* was to be Tested, and the Person he had advis'd with, had given him wrong Direction, and that this being an Error in Judgment, could not be amended, altho' the Statutes of Peofails shou'd be construed to extend to Criminal Cases. That tho' the Term is in Judgment of Law but one Day, with respect of what is the Act of the Court, and passes perfectly in the Court; it cannot, without manifest Absurdity, be said, That the Term is to be considered but as one Day, in respect of a Writ that is issued out one Day of the Term, to command Jurors to appear at another. Or that the Day when the Officer comes into Court to give an Account of his Obedience to a Writ, is the very Day of issuing it; and therefore a Distinction ought to be made, between Things done in Court, which are incomplete during the Term, and the Court giving Direction to an Officer out of Court by Writ, which is perfect and gone out from them, in order to be obey'd. And that where something was done upon the Process more than a mere formal Return, it seem'd not to be amendable in any Case by the Statutes of Edw. 3. or Hen. 6.

690.

Where the Term is accounted as one Day, and where not.

Where the Term is accounted as one Day, and where not.

691.

The *Districu*'s need not be made out the same Day the *Venire* is returnable, but it must be Tested that Day.

The Defendant's Council acknowledg'd, That if in Fact the *Districu*'s had been made out at a subsequent Day, and not actually wrote and seal'd the same Day it was awarded, yet if it had been Tested upon that Day, the Court ought not to have enjoin'd into it, but wou'd have presum'd it was issued the same Day it appear'd to bear Tests. But here the Writ being awarded the 23d, and bearing Tests the 24th, if it did not issue the 23d, to alter the need

the Tests to that Day, were to make it contrary to the Truth.

To these Arguments of the Defendant's Council, the Queen's Council reply'd; That they knew no such Distinction, as to the Privileges of the Crown, in Civil and Criminal Cases as was contended for, That if this Privilege belong'd to the Crown, in Cases of the Revenue, much more in the restraining of Crimes which was for the publick Benefit.

The Queen's Council reply, That the Privileges of the Crown were greater in Criminal, than in Civil Matters.

That if the highest Acts of the Court, such as their Judgments, might be amended, or alter'd, during the Term, as was admitted, much more the Mistakes of their Clerks, in Cases less considerable.

That as to the true Acts of Parliament of *Ed. 3.* and *Hen. 6.* that had been endeavour'd to be avoided by the Defendant's Council; they own, that it had been the common Opinion, that these and other Acts of Amendment did not extend to Cases of the Crown: But that which my Lord Chief Justice Vaughan said, f. 169. was a good Distinction, viz.

That upon doubtful Words in an Act of Parliament, an ancient Interpretation ought to be submitted to, but a thousand Resolutions against a plain Act of Parliament ought not to prevail. That it had been a receiv'd Opinion for many Years, That Assignees of Copy-hold Lands were not within the Statute of the 32 of *Hen. 8.* but that this Statute having been better consider'd since the Revolution, it has been settled that the Statute did extend to them: So that Opinions that pass *sub silentio*, without Consideration, may and ought to be alter'd, when they come to be stated and consider'd, and the Error appears.

An ancient Interpretation of a Statute ought to be submitted to only where the Words were doubtful, not where the Sense was plain.

They farther said, That the Crown had greater Advantages in some Criminal Cases, than in Civil; for in Criminal Prosecutions, such as Treason, the Subject was not allow'd Council, or a Copy of the Panel, or Indictment, at Common Law; but that all that the Prisoner could do in such Cases, was, to plead, Guilty, or, Not Guilty.

That the Reason my Lord Coke gave that the Statute of *Hen. 6.* did not extend to Criminal Cases,

Cases, was, because they were excepted; which, upon looking into the Statute, appear'd to be a Mistake: And therefore my Lord Coke's Opinion rather made for an Amendment, for he seem'd to grant, That it ought to be extended to all Cases that were not excepted.

That if this Mistake were not permitted to be amended, it wou'd follow, That Criminals wou'd escape upon every little Slip, which wou'd be a very great Mischief; and they thought Criminals ought not to be the Favourites of the Law. And that where Statutes were made for the Promotion of Justice, it was as well for the Benefit of the Subject as the Crown, to have them executed.

That as to the Notion of its being an Error in the Clerk's Judgment, and therefore it ought not to be amended: They said it was comprehended under the Word *Misprision*, whether the Error were Voluntary, or Involuntary.

The Court took till the last Day of the Term, to deliver their Opinions.

28 Novemb. Mr. J. Gould deliver'd his Opinion: held it was amendable by the Statute of Hen. 6. but on Perusal of *Blackmore's Case*, he had alter'd his Judgment: But, however, he held it was amendable at Common Law, and that where-ever the Fault did not alter the Issue, nor the Trial, nor the Crime, there it was amendable: That he thought the Case of *Sir John Curson*, in 2 Cro. and that of *Percival* and *Godfrey*, in 1 Sid. 243. were very strong Cases for this Opinion: And he thought that an Award the 23d of a Writ the 24th, was a perfect Continuance.

696. Of the same Opinion was Mr. Justice Powis; Mr. J. Powis but Mr. Justice Powel and the Chief Justice, is of Opinion, *contra*. it might be amended.

The Lord Chief Justice said he cou'd not think it amendable, either by Common or Statute Law. He said, That this Writ issuing the 24th, was not warranted by the Roll, but was another Writ, different from what the Court awarded; and that there being no Authority for it, the Jury cou'd not be

be distress'd upon it: And shou'd they amend, as was desir'd, it cou'd not be said to be an Amendment of that Writ which issued out the 24th of *October*, but it wou'd be making another Writ, for a Writ that issued out the 24th, cou'd not be a Writ that issued out the 23d. And that the Intent of the Statute of *Hen. 6.* was not to amend mistaken Writs, but Mistakes in Writs. And that the Law had always been, That if upon the Return of one Writ, another was to be awarded, that other Writ must be tested on the very Day it is awarded, and upon the Day of the Return of the first Writ, and if it bear Teste the next Day, all Process is discontinued: And he was of Opinion, That if this Error happen'd thro' want of Skill in the Clerk, and not thro' Negligence, that it ought not to have been amended, even in a Civil Case, much more in this; therefore he thought it ought to be quash'd, and a new *Venire* awarded. 697.

Mr. Attorney said, The Court being divided, he knew no Rule to stop Judgment. Where the Court is divided, Judgment may be entered.

Mr. Just. *Powel* said, Judgment wou'd go of Course, except the Court stopp'd it. 698.

Mr. *Montague* mov'd, That Mr. Attorney might not be permitted to sign Judgment.

Whereupon Mr. Justice *Powis* came over to my Lord Chief Justice, and Mr. Justice *Powel*, and agreed there shou'd be a new Trial; and the former Trial was quash'd. Mr. J. *Powis* agrees there should be a new Trial.

Mr. Attorney said, They ought to go back no further than to have a new *Disfringa's*. But then the Court said the Defendant wou'd be at Liberty to challenge all that were on the first Jury, they having given their Verdict before, and therefore it were better to have a new *Venire*. Mr. Attorney said he cou'd not take out a new *Venire* unless it were awarded by the Court: But the Court said, he might, as well as he took out the first: However, they said they wou'd advise how to make their Rule. Quere, the Trial being quash'd, whether a new *Venire* cou'd be taken out, unless the Court award it.

But I don't find *Tutchin* was ever prosecuted afterwards, or any thing more done in it. 699.

Tutchin not Prosecuted afterwards.

705. *The Trial of Captain THOMAS GREEN, and his Crew, before the Judge of the High Court of Admiralty, in Scotland, for Piracy, Robbery and Murder, the 5th of March, &c. 4 Annæ 1705.*

They are try'd by the Court of Admiralty in Scotland.

A Committee of the Privy-Council in Scotland having examin'd several of the Ship's Crew, in relation to the Piracy they were charg'd with, order'd they should be try'd before the Judge of the High Court of Admiralty, and they appointed the Earl of Loudon, the Lord Belhaven, the Lord Arnistoun, Sir John Horne, and Mr. John Cockburn, the Younger, to be Assistants to the said Judge.

And it was farther agreed by the Privy-Council, Some of them that the Lord Chancellor should write to Court for pardon'd, to a Pardon for Charles May, the Surgeon of the said Ship; Antonio Ferdinando, Cook's Mate; Antonio Francisco, Captain's Man; George Haines, Steward; George Glen, Quarter-Master, and Alexander Taylor, Foremast-man, in order to make Witnesses against the rest: And the Three first were made use of as Witnesses.

Two Indictments.

There were Two Indictments prefer'd of the same Tenour, The one against the Captain, (by the Name of Captain Thomas Green, Commander of the Ship call'd the Worcester, lying in Bruntsland Harbour) Captain John Madder, chief Mate of the said Ship; John Reynolds, second Mate of the said Ship; Thomas Linstead, Assistant to the Super-cargo, deceas'd; James Burn, Boatswain of the said Ship; James Sympson, Gunner; Andrew Robertson, Gunner's Mate; John Brucklie, Seaman; and George Kitchin, Seaman.

The

The other Indictment was prefer'd against *Henry Keigle*, Carpenter of the said Ship, *Worcester*; *Samuel Urlines*, his Mate; *George Heines*, Steward of the said Ship; *Daniel Stringman*, Cook of the said Ship; *Samuel Wilcocks*, Surgeon's Mate; *George Glen*, Seaman; *Henry Barnes*, Seaman; *Alexander Taylor*, Seaman; and *John Banantine*, Seaman, all of the Crew of the said Ship, *Worcester*.

The said Indictments were prefer'd by Mr. *Alexander Higgins*, Advocate, Procurator Fiscal to the High Court of Admiralty: And set forth, that whereas by the Law of God, and of this, and all other well govern'd Nations, the Crimes of Piracy, Robbery, and Murder are prohibited under the highest Pains; nevertheless, the said Captain *Thomas Green*, Commander of the said Ship, *Worcester*, and his Crew, were guilty of the said Crimes. Inasmuch as the said Captain, and his Crew, having sail'd from *England* in the said Ship towards the *East-Indies*, under Pretence of Merchandizing, the aforesaid Captain, and his said Crew, did, upon one or other of the Days of the Months of *February*, *March*, *April* or *May*, in the Year 1703, encounter and meet with another Ship or Vessel, sail'd by its own Men, or Crew, upon the Coast of *Malabar*, near *Calicat*; and the said Vessel bearing a Red Flag, and having *English* or *Scots* aboard, at least such as spoke the *English* Language, the said Captain, *Thomas Green*, and his Crew, after some Discourse had with them, did, without any lawful Warrant, or just Cause, attack the said other Vessel, or Ship, expecting no such Treatment, first by their Sloop which they had mann'd and furnish'd with Guns and other Arms for that Purpose, and after some time of engaging her by the said Sloop, they boarded her with the said Ship, *Worcester*, and having overcome the said Ship, they seiz'd her Men, and kill'd them, and threw them over-board, and then carried the Goods they found on board the said other Ship, on board the said Ship *Worcester*, and afterwards made Sale of the said other Ship, &c. And then they set forth great Part of the

The Effect of them.

795.

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ensuing Evidence, as is usual in Indictments in Scotland. And concludes, that the forenamed Persons, and each of them ought to be punish'd by Sentence of the said Court, with the Pain of Death, and Confiscation of their Movables, to the Example and Terror of others to do the like, in Time coming.

710. To which Indictments an Addition was made,

711. That the Sentence and Confiscation of Moveables, shou'd extend to the Escheat and Confiscation of the Ship and Cargoe.

The last Indictment proceeded on first. The Procurator Fiscal insisted to have the Indictment against *Henry Keigle*, the Carpenter, and the rest, first proceeded upon.

712. The Council for the Prisoners, in this Indictment, objected, That the Crime being laid to be committed in the *East-Indies*, far without the *Scottish* Seas, and that there being no Prosecutor, either of the Owner of the Ship or Goods, pretended to be seiz'd, or of the nearest of Kin, of the Persons alledg'd to be murder'd, the Admiralty of *Scotland* cou'd have no Jurisdiction in the Cause, and that Prosecutions in Criminal Cases must be either in the Place where the Crime was committed, or in the Place where the Party accus'd dwelt, or where he was born; and none of these cou'd be pretend- ed here: And that tho' it was held that Pirates might be tried where-ever they were found, that was meant only where the accus'd were notoriously such. And further, If it was admitted that the Prisoners might be accus'd in *Scotland*, yet it ought to be before the Court of Justiciary, and not before the Admiral, whose Jurisdiction extended only to the Seas within Her Majesty's Sovereignty.

They are answer'd.

To this it was answered by the Queen's Council, That a Pirate might be try'd where-ever he was taken, and cou'd not decline the Admiral's Jurisdiction.

And that the being charg'd with one Act of Piracy, was sufficient to empower the Court to take Cognizance of the Cause.

And

And that the Court of the Admiral was the proper Court, his Jurisdiction being unlimited on the Seas.

It was further urg'd in Behalf of the Prisoners in Other Exceptions, That this Indictment, That they being charg'd as Actions, That complices with their Captain, they ought not to the first Indictment be put to answer till the Captain himself were try'd. And that they being under his Command, cou'd ought to be not be charg'd with doing any thing as his Crew, try'd first, for till he were first try'd, because he might be able to that those in make such a Defence for himself and them, as the last were charg'd but as they were destitute of. Accomplices.

To which the Queen's Council reply'd, That the Captain and his Crew were not charg'd with any swer'd. thing done by him as their Captain, or by them as his Crew; but they were charg'd as Fellow-Criminals, and Partakers in those Crimes of Piracy, Robbery, and Murder, which they cou'd not be warranted to commit, by any Commission or Character the Captain cou'd have.

The Council for Capt. Green, and those who 713: who were comprehended in the Indictment with Exceptions to him, alledg'd, That it being acknowledg'd by the the other Indictment, and Prosecutors, that Reynolds, who was indicted with the Proceedings thereon, them, was alhoar when the Crimes they were charg'd with were committed, and consequently innocent of them; and the Prisoners having cited and rely'd on the said Reynolds as a Witness for them, they insisted, That he shou'd be try'd before them, that he being acquitted, they might make use of his Testimony, and that it was hard the Prosecutors shou'd include them and their Witnesses in the same Charge, and so deprive them of the Means of making their Defence.

To this it was answer'd by the Prosecutor, the Answer'd, Procurator Fiscal, That it was unreasonable that the Prisoners shou'd pretend to give Directions which of their Accomplices shou'd be first try'd, and that this was never allow'd, without some Proof were made of the Innocence of such Persons; and therefore unless Capt. Green, and the other Prisoners, cou'd show that Reynolds was not present in the Action, their arbitrary Demand to have

have him try'd first, was unreasonable, and not to be regarded.

These were the several Preliminary Defences made to the said respective Indictments. The following Objections are such as they all join'd in, viz.

Exceptions in which the Prisoners in both Indictments join.

First, They said, Their Indictments were too general and indefinite, in that the Ship was not named or described, which was said to be attack'd, nor were the Persons alledg'd to be murder'd, named, or the Quantity or Quality of the Goods alledg'd to be taken or spoil'd, specified.

Secondly, That neither the Day or Place, when and where this Piracy was committed, was specified in the Indictment.

Thirdly, That the Presumptions and Circumstances on which the Indictments were founded, were not sufficient to maintain the Charge of Piracy, &c.

Fourthly, That the Additional Clause, as to the Forfeiture of the Ship and Cargo, was groundless and unwarrantable.

714

To the first Objection, it was answered, That the Indictment was as certain and particular as the Nature of the Thing wou'd bear; for supposing the Prisoners had destroy'd the Ship and Men, and embezzled the Cargo, as was charg'd, it was impossible to be more particular; and that this was but an Aggravation of their Crime, and ought not to be insisted on as an Argument to stay the Proceedings against them.

And whereas the Prisoners had objected, That they were cloath'd with a Commission, and therefore ought to be presumed to have acted legally, till the contrary appear'd.

Answer.

It was answer'd, If they had thought their Commission wou'd have born them out, they ought to have pleaded it; but their declining to rely upon that, was an Argument of their Guilt. And further, That their Commission oblig'd them to keep a particular Journal of every Ship they should attack hostilely, and no such thing appearing upon their Journals, it was a strong Presumption that they

they had unjustly and unwarrantably attack'd the Ship mentioned.

As to the *Second* Exception, That Time and Place ought to be certainly specified in the Indictment: It was answer'd, This was not necessary or essential to the Indictment, unless where the Nature of the Crime requir'd it; as where one was charg'd with breaking the Sabbath, or drawing a Sword in the King's Palace, &c. but as to Crimes which were such at all Times and Places, there was no Necessity of mentioning them: And it was never done unless the Party charg'd acknowledg'd the Fact to have been committed, but wou'd excuse himself of being accessory to it, by shewing he was elsewhere.

As to the *Third* Objection, It was absurd to demand visible Effects of the Crime, where it was expressly laid in the Indictment, That the Prisoners Piratically attack'd the Vessel, threw the Men into the Sea, and sold the Ship: And besides, there were Circumstances that might induce one to believe, that the Goods were still on Board Captain Green's Ship. And further, That presumptuous and circumstantial Evidence had ever been admitted in these Cases; and here they had these and more; for there were several positive Witnesses to prove the Charge. 715

That as to the *Fourth*, Since the Pirate was presum'd to have the Ship and all in it at his Command, it follow'd naturally, that Confiscation of Ship and Goods shou'd be a part of the Pains inflicted for the Offence. 716,

13 March, 1705. The Court being sate, and having heard and debated the several Objections made by the Prisoners to the said Indictments, and the answers that had been given to them by the Prosecutor Fiscal; they over-ruled all the Exceptions, and adjudged, that the Indictment was sufficient, and well supported; saving as to the Confiscation of the Ship and Moveables, which they took Time to consider of, till the Verdict should be brought in. 717.

728.

A Jury of 15
sworn.

14 March, 1705. The Court being sat, a Jury of fifteen Masters of Ships, and Merchants, were sworn, and Mr. *Alexander Higgins*, Procurator Fiscal, as Prosecutor, produc'd his Proofs. And first,

Antonio Ferdinando, Cook's Mate, of the Ship *Worcester*, was call'd, and sworn.

729.

He depos'd, That about two Years and half since, at *Callicoiloan*, upon the Coast of *Mala-Evidence*, of *bar*, the Deponent went on Board the Sloop belonging to Captain *Green's* Ship the *Worcester*, and and destroy that he then entred into the Service of Mr. *Loving* the Men. *day*, Purser of the said Ship; and that about a Month after the Deponent came on Board, there was an Engagement, between the said Sloop, and Ship *Worcester*, on one side; and another Ship, sail'd by white Men, on the other; and that the said other Ship bore *English* Colours, and her Crew spoke *English*: And that before the Engagement, Captain *Green* and the Merchant [*Coge Commode*] and Mr. *Loveday*, went on Board the said Strangers Ship, and staid there the space of a Glass, and then return'd on Board the *Worcester*, and immediately Mann'd the said Sloop with about twenty Men; of which Number, the said Capt. *Green*, Mr. *Loveday*, the Supercargoe, the Gunner, and Carpenter, were part: That they had four Guns, and two Pattereroes aboard the Sloop, and that afterwards Capt. *Madder* came on Board them, and they engaged the said other Ship in a running Fight, for two Days, and the third Day they boarded her with the Sloop, and kill'd the Crew with Hatchets, and threw them Overboard; and that Capt. *Green*, Capt. *Madder*, and *Simpson* the Gunner, were three of those who went on Board the said Ship, and kill'd the Men; and that during the Engagement, the Ship *Worcester* came up, and fir'd at the said other Ship, but did not board her: That he believes the Men kill'd on Board the taken Ship might be about ten; and that there were but few Goods on Board her, which were carried on Board the *Worcester*: That afterwards the taken Ship was carried into *Callicoiloan*, by

by some of the *Worcester's* Crew, and there sold: That the Deponent could not say what Men were kill'd or wounded on Board the Sloop, or the Ship *Worcester*, but that he himself was wounded in the Arm, (*Which he shew'd.*) And depos'd further, That Capt. *Madder* threatned him, if ever he spoke of the Engagement either to white or black, he wou'd kill him, and heave him Overboard. And depos'd, That the Upper-Coat he then wore was taken on Board the said Ship: He said, That *Haines, Bannantine, Bruckly, Wilcocks, Burn, Robertson, Glen and Taylor*, eight of the Prisoners, were on Board the *Worcester*, and *Keigle, Kitchin and Linstead*, on Board the Sloop, with Capt. *Green, Madder and Simpson*, during the Engagement; and believes that *Reynolds* was then ashoar at *Callicoiloan*: That the Ship was sold to a King in *Malabar*; and his Agent's Name who bargain'd for it, was *Coge Commodore*: That this Engagement was between *Tillecherry* and *Calleret*, upon the Coast of *Malabar*, and thinks the taken Ship might carry about 20 Guns. He depos'd further, That himself was on Board the said Sloop, during the Engagement: That he believ'd in God, and was born of Christian Parents, and deposes, That this was the Truth, as he shou'd answer it to God. 730.

Charles May, Surgeon of the *Worcester* was sworn.

He depos'd, That he went from *England* in the *May*, the Surgeon's *Evidence*, the *Worcester*, and that when they came to the Coast of *Malabar*, he was set ashoar at the *Ibeck*, the Landing-*dence*, of the place, and from thence went up some Miles to *Callicoiloan*; and about a Fortnight after he heard a firing at Sea, and that meeting with *Coge Commodore*, Merchant to the *Worcester*, and the Interpreter, he ask'd them, What it meant? And they told the Deponent, The *Worcester* had gone out, and was fighting at Sea with another Ship. And that the next Morning the Deponent came to the Shoar, and saw the *Worcester* return'd to her Birth, about four Miles from the Shoar, and another Vessel riding at her Stern; and that seeing the

the Long-boat of the *Worcester* come ashore, he ask'd the Men, What brought them ashore? (it not being usual for Ships Boats to come over the Bar, because of a great Sea;) and they answer'd, Capt. *Madder* sent them for a Pinguetta (a Country Bret) of Water, for they had ilav'd, and spilt all their Water on Board, and had been bulking all Night. By which he understood, that they had been at some hard Labour, as if their Ship had been driven from her Anchor, and they had been haling it up again. That they also told the Deponent, they had brought a Ship in with them, but said nothing of a Fight: That four or five Days after, the Deponent went on Board for Medicines, for the sick Men he had on Shoar, and when he came aboard he saw the Deck lumber'd with Goods, and ask'd *Madder*, what they had got there, and *Madder* curs'd him, and bid him mind his Plaister-box: That he was afterwards inform'd that the Ship which rode astern of the Ship *Worcester*, was sold to *Coge Commodo*, the Ship's Merchant, at *Keilon River*, and carried in there by part of the *Worcester's* Men, and that he heard the Interpreter say, that *Coge Commodo* complain'd he had bought the Ship too dear: That some time after *Antonio Ferdinando* was sent ashore to the Deponent, being wounded in the Arm, and that the Deponent found it to be a Fracture, and thought it look'd like a Gun-shot; and that the said Black told the Deponent he had been set ashore at *Cochin*, and a *Dutch Surgeon* set his Arm there: That when the Deponent came on Board the *Worcester*, he found two more of the Men wounded, and asking them how they came by their Wounds, *Madder* bid him ask no Questions, and forbid the Men to answer any; and order'd the Deponent immediately on Shoar: And that all this happen'd about the Months of *January* or *February*, 1703. He depos'd further, That he never afterwards heard any of the Ship's Crew talk of their taking a Ship: That when the *Worcester* sail'd from *England*, she had about thirty-five or thirty-six belong'd to her Crew. He deposes, That on the

the Coast of *Malabar* the Ship sprang a leak, and they carried her to *Bengal*, which was five Weeks sail, to refit; and he can give no Reason why she was not brought into some Place in *Malabar* to refit: That Mr. *Linsted* and *Hammond* were sent ashore to *Keilon*, to take care of some of the Cargo, which was to come from thence, when this happened: And that *Keilon* was about seven Leagues from *Callicoloan*.

Antonio Francisco, a Black, Servant to Capt. *Green*, was sworn.

He depos'd, That his Mistress, in *Pegu*, caus'd him to be baptiz'd a Christian, and he own'd the Christian Religion: That he came into the Service of Capt. *Green* at *Delagoa*: That while they were on the Coast of *Malabar*, he was nail'd to the Floor in the Forecastle of the said Ship *Worcester*, and that he heard six Guns fir'd from on Board the *Worcester*, but no firing from any other Ship: And that two Days after the said firing, he saw some Goods brought on Board; and *Antonio Ferdinando*, the other Black, told the Deponent, they were brought from on Board another Ship they had taken; and that there were ten Men kill'd on Board the said taken Ship; and he shew'd the Deponent a Wound he had gotten while he was on Board the Sloop, at taking the other Ship, and that the said Ship was taken by the said Sloop belonging to the *Worcester*; but charg'd the Deponent not to tell any Person whatever of the said Engagement: But that the Deponent saw no other wounded Men, nor can he tell how long it is since he heard the said Guns; But that the said *Antonio Ferdinando* told him these Things upon the Coast of *Malabar*; and that the said *Antonio Ferdinando* came aboard the *Worcester*, when they were going to *Bengal*: That the Deponent was chain'd in the Forecastle about ten Days, before he heard the shooting, and remain'd so two Months.

James Wilkie, Taylor, of *Edinburg* was sworn.

He depos'd, That in *October* last, after Capt. *Green*'s Ship was brought to *Bruntisland*, he went over with his Mother to enquire after his Brother

Francisco, the Captain's Servant, deposes what he heard about taking the Ship.

Evidence of some Words that *Haines*, one of the *Worcester*'s Crew, had let fall since their coming to

Andrew Scotland.

732. *Andrew Wilkie*, who went to the *East-Indies* with *Capt. Drummond*; and that being at *Mrs. Seaton's House in Bruntisland*, *George Haines*, one of the Prisoners, happen'd to be in the Company; and the Deponent ask'd him if they had not seen *Captain Drummond* in their Voyage; and *Haines*, in a Passion, answer'd, Damn me, what have I to do with *Capt. Drummond*? But after they had drank some Time together, the Deponent ask'd *Haines* again, if he had not heard of a *Scotch Ship* in his Passage to or from the *East-Indies*? Whereupon *Haines* answer'd, That while they were upon the Coast of *Malabar* (where they took in a Black that was then with him) a *Dutch Ship* inform'd them that one *Capt. Drummond*, who commanded a *Scotch Ship*, was turn'd Pirate; which occasion'd them to Man their Sloop, and make themselves ready in Case they shou'd be attack'd; but they did not happen to see the said *Scotch Ship*. That *Haines* added, That he had in his Custody, at the Time the *Worcester* was seiz'd in *Leith Road*, that which he would not have fallen into the Seizers Hands for twice the Value of the Ship; and that he threw it Overboard after the Ship was seiz'd, saying, *Let them seek it now at the bottom of the Sea*: And that there was still in the Ship, that which wou'd never be found by the Seizers, unless they pull'd her Board from Board; and he knew very well where the Thing lay: That they desir'd *Mrs. Seaton* to enquire farther into this Matter; but she said her Daughter was the properest Person, for she was *Haines's Sweetheart*: And that *Anne Seaton*, his Sweetheart, said, the next Morning, he found they had a Design to pump him; but they shou'd be never the wiser for him.

Kenneth Mackenzie was sworn; and depos'd, He heard *Anne Seaton* say much the same, the last Witness depos'd he heard her say.

William Wood, one of the Gunners of Her Majesty's Artillery, depos'd, That being in Company with the Prisoner, *Haines*, at *Bruntisland*, he seem'd melancholy: Whereupon one *Henderson* ask'd him the Reason of it, and he reply'd, *It is a Wonder,*

Capt. GREEN, &c. Anno 1705.

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Wonder, since we did not sink at Sea, that God does not make the Ground open, and swallow us up, now we are come ashore, for the Wickedness that has been committed during this last Voyage, on Board that old Bitch Bess, (pointing to the Ship Worcester.) And that afterwards, as the Deponent was walking with *Haines*, on the Sands, in *Bruntisland*, and the Deponent telling *Haines* that Capt. *Madder's* Uncle was burnt in Oil, for attempting to burn the Dutch Ships in *Amsterdam*. *Haines* said, If what *Madder* had done during this last Voyage were as well known, he deserv'd as much as his Uncle had met with.

Henderson was sworn; and depos'd, That he heard *Haines* use the Expression in the last Deposition, namely, *It is a Wonder, since we did not sink, &c.*

Anne Seaton was sworn; and depos'd, That she heard *Haines* use the Expression above, *It's a Wonder, that since we did not sink, &c.* and that he knew more of Capt. *Drummond*, than he wou'd express at that Time: And that he told the Deponent, that when the Ship was seiz'd in *Leith Road*, he had aboard with him, that which he wou'd not have had shou'd fall into the Seizers Hands, for twice the Value of the Ship, but that he threw the same Overboard.

John Brown, Skipper, was sworn.

He depos'd, That he went on Board the *Worcester*, by Order of the Committee of Council, when the Goods were unloaded, and saw the Hatches, which were fast seal'd, open'd, That the Goods on the Larboard-side were much damag'd, That they were regularly stow'd, but few of the pack'd Goods were numbred, or mark'd, as was customary.

Archibald Hodge, Skipper, being sworn, depos'd, That he also saw the the Goods unloaded, and most part of them wanted Numbers and Marks, as other Goods us'd to have.

John Glen, Goldsmith, of *Leith*, was sworn.

He

Evidence of He depos'd, That going on Board the *Worcester*, Madder's ha- the second Day after she came into *Leith* Road, ving the Seal Capt. Madder took a Seal out of his Pocket, and of the *Scotch* ask'd the Deponent what he thought of the *Scots-A-African*, and *African*, and *Indian* Companies Arms, and at the same *East-India*- Time gave the Deponent the said Seal in his Hand; Company, in and the Deponent found thereon, the *St. Andrew's* his Possession. Cross, a Dromedary, or Camel, with a Castle on the Back of it, and a Ship with the rising Sun above the Helmet, and two wild Men as Supporters, and that the Seal, to the best of his Remembrance, was about the bigness of an *English* Half Crown, and had a Handle of *Lignum Vitæ*; but that the Seal exhibited in Court, was not the same as Capt. Madder show'd the Deponent.

734. Among Capt. *Green's* Papers were found Instru- The Instru- tions from the *English East-India* Company, di- ons given to recting, That no Letter shou'd be sent to *England*, the Captain by by the Captain, the Supercargoe, or any of the the *East-India* Crew, but only the Letter which they directed to Company, to be sent Over-land to them, giving an Account of use an extra- the Dead, &c. And that when the Captain writ, ordinary Cau- he shou'd make use of an Alphabet which they gave tion and Pri- him; and, for the greater Secrecy, all the Letters vacy in the shou'd be directed, To Capt. *Tho. Bowry*, in *Well-* Letters they *Close-Square, London*: And that the Letter shou'd sent home. have no Date or Name to it.

Us'd as an Ar- *These Instructions were made use of as an Argu-* gument that ment, that Capt. *Green* was sent out by the Eng- the Company lish Company on purpose to destroy the *Scotch* fitted out this Ship.

Ship on pur- After the Evidence was all given, Sir *David* pose to de- *Dalrimple*, Her Majesty's Solicitor, and one of stroy the the Assistants to the Procurator Fiscal, shew'd the *Scotch* Ships. Nature of the Crime, and the aggravating Circum- Sir *D. Dalrimple* shews the stances it was attended with, and how strangely it Nature of the was discover'd: He said that a Pirate was at War Crime, and with every Individual, and with every State, makes his Ob- Christian or Infidel: That properly they had no servations on Country, but separated themselves, and renounc'd the Evidence. the Benefit of all lawful Societies: That they were worse than Beasts of Prey; inasmuch as their fa- tal Reason furnish'd them with greater Cunning to do

do Mischief: And whereas such Brutes follow but the bent of their Natures, and that promiscuously Pirates are forc'd to extinguish Humanity in themselves, and then prey only upon Men, and especially upon Traders, the most inoffensive: He shew'd that the first Discovery of this Matter came from themselves, from Words drop'd in Passion, or express'd under the Weight of Guilt, concerning the Villanies that had been perpetrated in their Voyage; and said, that the Lords of the Privy Council had taken all imaginable Caution in examining into the Truth of the Facts, before they directed any Prosecution. Then Sir *David* proceeded to sum up and make his Observations on the Evidence; and particularly he observ'd, That *Ferdinando's* Evidence was fortify'd by the Ship's Journals, which gave an Account of the Sloop's being furnish'd with Arms, in the Month of *February*, as was laid in the Indictment. That it appear'd also from the Journals, that the *Worcester* sprung a-leak on the Coast of *Malabar*, and altho' they might have refitted her at *Goa*, or *Surat*, on that Coast, they chose rather to make a dangerous Voyage of 7 or 800 Leagues in a leaky Vessel, than re-fit on the *Malabar* Coast; which he made use of as an Argument of their Guilt, for that they dare not venture into any Port thereabouts, lest the Fact shou'd be discover'd: That the Cypher which was given to the Captain to write by, and that extraordinary Secrecy enjoin'd, as appear'd from the Papers found on Board, shew'd, that from the beginning some ill Design was intended: And that there was more Caution us'd than fair Trading cou'd require.

735.

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That another Argument of her being sent upon an ill Design, was, That the Ship being of 200 Tuns, 20 Guns, and Mann'd with 36 Men, her whole Cargoe Outward-bound, shou'd amount but to 999 *l.* as appear'd by the Voucher at the Custom-house; and the greatest part of this Cargoe too consisted in Arms: That it seem'd exceeding strange a Voyage so hazardous and expensive shou'd be under-

der-

738. dertaken with so small a Stock, unless something else than Trading was intended: And upon the whole, he said, In so dark a Crime, committed at a Place so distant and solitary, a more convincing Proof, cou'd not be given.

Then the Prisoners Council made their Observations; but their Speeches are not incerted in the Trial; only in the Appendix to the Trial are added some of the Heads of what they insisted on in Behalf of the Prisoners: As, *First*, That *Antonio Ferdinando* was not a legal Witness, because he was not worth ten Pounds *Scots*: And, *Secondly*, That he was no Christian, and did not understand the Religion of an Oath. The same Objection was made to *Antonio Francisco*, Capt. *Green's* Servant: And it was objected to *Anne Seaton*, That being a Woman, she was not a legal Witness.

To these Objections it was answer'd, That tho' ordinarily one who was not worth ten Pounds *Scots*, cou'd not be a Witness, by the Laws of *Scotland*, yet in Crimes so atrocious and occult, and committed against the Law of Nations, this Rule did not take place: And that as to these Blacks not being Christians, it was a Mistake, they having acknowledg'd themselves such: And it was also rul'd, That in Crimes of this Nature, a Woman was a good Witness.

The Jury withdraw, and choose their Foreman and Clerk.
The Verdict is given in, in Writing, and sign'd by the Foreman and Clerk.
Most Votes determinethe Fact.

The Council on both sides having concluded, the Jury were order'd to withdraw, and return their Verdict on *Friday*, the 16th of *March*; to which Day the Court adjourn'd. The Jury being withdrawn, chose Sir *James Flemming*, their Chancellor, [Foreman,] and *William Nelson*, another of their Number, Clerk: And on the 16th of *March*, the Court being sate, the Jury gave in the following Verdict in Writing, viz. *They, by Plurality of Votes, find, that there is one clear Witness, as to the Piracy, Robbery, and Murder laid; and that there are accumulative and concurring Presumptions proved for the Piracy and Robbery so laid: but find, that John Reynolds,*

Second

Capt. GREEN, &c. Anno 1705.

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Second Mate of the said Ship, was ashore at the Time of the Action laid.

They are all convicted, but Reynolds.

Subscribed,

Ja. Flemming, Chancellor.

Will. Nelson, Clerk.

Then the Court adjourn'd to Wednesday, the 739.

21st of March; when the Court being met, and having considered of the Verdict, they did, by Judgment given and pronounced, by an Officer appointed for that Purpose, the Mouth of John Park Dempster [the Person who pronounces the Sentence] decree and adjudge, That the said Capt. Thomas Green, John Madder, James Simpson, Henry Keigle, and George Haines, be taken to the Sands of Leith, within the Flood Mark, upon the first Wednesday in April next, being the 4th Day of the said Month, between the Hours of Eleven in the Forenoon, and Four in the Afternoon; and there be hang'd on a Gibbet till they be dead. The same Sentence was pass'd upon George Glen, Alexander Taiton, Andrew Robertson, and George Kitchin, to be Executed on them, on Wednesday, the 11th of April: And that James Burn, John Bruckly, Samuel Wilcox, John Banantine, and Thomas Linstead, be Executed on Wednesday, the 18th of April: And further decree, That all their Moveables, Goods, and Geer, and particularly the Ship Worcester, and Cargo, be forfeited to Her Majesty; saving to all Persons, pretending Right to the said Cargo, their respective Claims, to be discuss'd in the High Court of Admiralty. And they did acquit the said John Reynolds: And they recommended Tho. Linstead, Assistant to the Supercargo, to Her Majesty's Mercy.

740.

commended to the Queen's Mercy.

The

744. *The Trial of ROBERT FIELDING, Esq; for Bigamy, at the Old-Baily, London, the 4th of December, 5 Annæ, 1706.*

745. The Indictment, for Felony, in marrying the Dutches of Cleveland, the Prisoner's first Wife being alive.

THE Indictment sets forth, That the said Robert Fielding, on the 9th of November, in the 4th Year of the Queen, at the Parish of St. James's, Westminster, in the County of Middlesex, took to Wife one Mary Wadsworth, Spinster, and that afterwards, viz. on the 25th of the same Month of November, in the Year aforesaid, at the Parish of St. Martins in the Fields, in the said County, he did feloniously take to Wife the most noble Barbara, Dutches of Cleveland, (the said Mary Wadsworth, his former Wife, being then alive) against the Queen's Peace, &c.

To which Indictment Mr. Fielding pleaded, Not Guilty: And a Jury being sworn, and charg'd with the Prisoner, Mr. Raymond open'd the Indictment, and Sir James Montague open'd the Evidence, after which the Witnesses were call'd, and first,

746. Mrs. Villars's Evidence, of her Lodging, when she was not at home, and left her imposing Word, That the Deponent shou'd call upon her, or it might be 500*l.* out of her way: That afterwards the Deponent met with Mrs. Streights, and Mr. Fielding; and Mr. Fielding ask'd the Deponent, if she knew Mrs. Delean? And she told him, she us'd to cut her Hair: That thereupon Mr. Fielding said he was in Love with Mrs. Delean, and ask'd the Deponent if she cou'd not assist him in his Courtship; and whether a Marriage might not be brought about, and that the Deponent told Mr. Fielding then, she did not know whether she had such

such an Interest in the Lady, as to be serviceable in such a Design.

That about three Days after Mrs. *Streights* came and fetch'd the Deponent to Mr. *Fielding* again; and he said he found the Lady was worth 60000*l.* (as he had been told before) and ask'd where she liv'd; and the Deponent told him she liv'd in *Copthal-Court*, near the *Change*, and that her Country-House was at *Waddon* in *Surrey*; that thereupon Mr. *Fielding* said he wou'd go to *Tunbridge*, and call by the Way and see Mrs. *Delean's* Gardens, which accordingly he did; hoping, by that means to get a sight of Mrs. *Delean*: That at his Return, he told the Deponent the Gardens were very fine; and he had seen the Lady thro' a Casement, and that she might have a more perfect View of his Person, he took several Turns in the Garden; and pull'd out his Watch, and set it by the Sun-dial; and that he came round the Country, and almost murder'd his Horses, to get a Sight of her: That in order to get into Mrs. *Delean's* Company, and have a further Knowledge of her, he desir'd the Deponent to acquaint Mrs. *Delean*, that the Dutchess of *Cleveland* was desirous to see her Gardens; which the Deponent did: But Mrs. *Delean* desir'd, it might not be that Week, but the Week following; because she was to see a Race, at *Banstead-Downs*: That when the Deponent told Mr. *Fielding* this, she found the Dutchess knew nothing of the Message; but he said he wou'd go to the Race at *Banstead-Downs*: and when he came back, he told the Deponent, he believ'd he saw Mrs. *Delean* upon the *Downs*, and he bow'd to her, and she to him; and that he afterwards sent a Letter to her, by a Servant, who was not in a Livery, and that Mrs. *Delean* read it, but said, it requir'd no Answer.

That the Deponent perceiving Mr. *Fielding* had no Knowledge of Mrs. *Delean*, she acquainted a young Woman (one Mrs. *Wadsworth*) with his Design, and propos'd her personating Mrs. *Delean*, and marrying Mr. *Fielding*, which Mrs. *Wadsw*

worth very readily came into; and several Letters pass'd b. tween Mr. *Fielding* and Mrs. *Wadsworth*, (whom he took for Mrs. *Delean*) and Mr. *Fielding* sent several Presents to the Lady, by the Deponent, particularly a Gold Apron stuck with Green, and that Mr. *Fielding* continued sending Presents and Letters, from *Bartholomewtide* to my Lord Mayor's Day, and that Night he desir'd the Deponent to bring the Lady to his Lodgings, which she did, about Nine at Night, in a Mourning-Coach, and Mr. *Fielding* was not then at home; but soon after he came in, and fell down upon his Knees, and kiss'd her, and us'd abundance of fond Expressions; and sent for *Margaretta*, who sung them two Songs, *Charming Creature*, and *Ianthe the lovely*: After which he sent for Wine and Plumb-Cakes, and urg'd the Lady very much to marry him; which she declin'd: But he made her promise to come to him the *Wednesday* following; however, because she wou'd not seem too forward, 'twas *Friday*, the 9th of *November*, before she came to his Lodgings again; and then Mr. *Fielding* took Mrs. *Wadsworth* in his Arms, and said, *Nothing cou'd ease his Mind, but a Promise to make him happy, in marrying him presently*, and he wou'd fetch a Priest. Mrs. *Wadsworth* pretended to reject the Proposal, and was going away; but he said she had disappointed him once before, and he was resolv'd to make her his own before she went away; and he went out for a Priest, and lock'd them into his Chamber: That Mr. *Fielding* soon after return'd, and brought a Priest with him, in a long red Gown, a fur Cap, and a long Beard, and Mr. *Fielding* told her, that this was the Holy Father that was to make them one: And Mrs. *Wadsworth* said, *How shall I know this Priest is in Orders?* And the Priest pull'd a Picture out of his Pocket, of the bigness of a Crown-piece, and told them, that none but Priests had such Pictures.

748. That after they had supp'd, *Bouchier*, and the rest of Mr. *Fielding's* Servants, were order'd down Stairs, and the Priest call'd for Water, Salt, and Rosemary, to make Holy-Water, and having bless'd

blest'd it, the Ceremony was perform'd in the Bedchamber, none being present but Mr. *Fielding*, Mrs. *Wadsworth*, the Priest, and the Deponent; and when Mrs. *Wadsworth* seem'd still unsatisfied whether he was a Priest, the Priest took from under his Gown a piece of Silk, like a Scarf, mark'd with a Cross in the middle; and said, none but Priests us'd such a Thing: That the Service being in *Latin*, when the Priest came to that part, *With thou have this Woman to be thy wedded Wife?* Mrs. *Wadsworth* desir'd it might be repeated in *English*; and accordingly the Question was ask'd Mr. *Fielding* in *English*, and he answer'd, *Yes, with all my Heart*: And the Lady being ask'd, *If she wou'd have this Gentleman for her Husband?* She answer'd, *Yes*, faintly; and Mr. *Fielding* said, *You don't speak it so earnestly as I did, you must say, With all my Heart and Soul*; which she did: That afterwards the Priest blest'd the Ring, and gave it to Mr. *Fielding*, to put it upon the Lady's Finger; and the Ceremony being ended, after they had taken a Glas of Wine, the Priest went away, and the Deponent put Mrs. *Wadsworth* to Bed, and Mr. *Fielding* call'd her, *His dear Wife, the Countess of Fielding*, and said he wou'd make haste and fly to her Arms; and he went to Bed to Mrs. *Wadsworth*, and call'd the Deponent to see them in Bed together; which she did: And the next Morning also she saw Mrs. *Wadsworth* in naked Bed with Mr. *Fielding*: That as soon as Mrs. *Wadsworth* got up, she went away in a Hackney-Coach, and told Mr. *Fielding*, at parting, she did not know when she shou'd return; but about a Fortnight after she came to the Lodgings again, and Mr. *Fielding* order'd *Bouchier* to let clean Sheets be laid on; and the Deponent saw them a Bed together that Night, and the next Morning: That Mrs. *Wadsworth* went away in a Coach, as before, and Mr. *Fielding* continued sending Letters to her till she came again, which was about fifteen or sixteen Days after; and the Deponent then also saw them in Bed together: That Mr. *Fielding* then told Mrs. *Wadsworth*;

he was about to leave his Lodgings, and be with the Dutchess of *Cleveland*: When she came next time, *Bouchier* soon after came in, and said, he had brought his Master's Night-gown and Slippers, from the Dutchess of *Cleveland's*.

Council. Why was this Marriage kept private?

Villars. Because Mr. *Fielding* took the Lady to be Mrs. *Delean*, and she pretended to be afraid of disobliging her Father, who had part of her Fortune in his Hands.

Mr. Just. *Powel.* How long was it before it was discover'd.

Villars. It was not discover'd till the latter end of *May*, or the beginning of *June*.

749. *Council.* Can you tell how it came to be discover'd?

Villars. Mrs. *Wadsworth* sent to Mr. *Fielding* for Money, and then he found she was not a Woman of that Fortune he took her to be; and Mr. *Fielding* took Mrs. *Streights* into a Closet, at the Dutchess of *Cleveland's*, and sent for me thither, and wou'd have his Presents return'd him; and he beat me, and ask'd me if that was a fit Wife for him? and he took a Steel Thing in his Hand, and said, if I wou'd not unsay what I had said of his Marriage with *Wadsworth*, he wou'd slit my Nose, and he wou'd bring two Blacks, and one of them shou'd hold me upon his Back, and the other shou'd break my Bones.

Mr. *Fielding.* Did I ever appear in publick with Mrs. *Wadsworth*?

Villars. No, never.

Mr. *Fielding.* How came I to send such mean Presents to a Person of Mrs. *Delean's* Quality?

Villars. I am sure such Presents were sent, and that he really marry'd Mrs. *Wadsworth*, for Mrs. *Delean*.

Mr. Just. *Powel.* When was the first Time you acquainted the Dutchess of *Cleveland* with this Matter?

Villars. Mrs. *Fielding*, that is now, told me, that Mr. *Fielding* beat her in *Whitehal-Lodge*, and said, she shou'd have occasion to bring me upon my

my Oath, to prove her Marriage; and I went with Mrs. *Fielding* to the Duke of *Grafton*, and told him, I was sure Mr. *Fielding* was marry'd to her the 9th of *November* before.

Mr. Just. *Powel*. Was this before any parting between the Dutcheſs of *Cleveland*, and Mr. *Fielding*?

Villars. It was about a Fortnight or three Weeks before the Difference between Mr. *Fielding* and the Dutcheſs of *Cleveland*.

Mr. J. *Powel*. Why did you not apply yourself to Mr. *Fielding* for your Reward?

Villars. I was to have no Reward; Mrs. *Streights*, indeed, left ſuch Word at my Lodgings, but I had no Promise of it from Mr. *Fielding*.

Mr. *Fielding*. What Reward did the Dutcheſs of *Cleveland* promise you?

Villars. I never ſaw the Dutcheſs of *Cleveland*, or was ever promis'd any Reward.

Sir *Ja. Montague*. Now we ſhall prove, that Mr. *Fielding* marry'd the Dutcheſs of *Cleveland*, after he was thus marry'd to Mrs. *Wadſworth*.

Mr. *Fielding*. I do not deny my Marriage to the Dutcheſs of *Cleveland*.

Sir *Ja. Montague*. Then we ſhall go on, and verify Mrs. *Villars*'s Evidence in every Particular.

Mr. *Searle* ſworn.

He depos'd, That the beginning of *Michaelmas* Wiſneſſes Term, 1705, Mr. *Fielding* came to him to call'd to corroborate Mrs. *Doctor's-Commons*, and deſir'd him to ſearch for Mr. *Deſean's* Will; and it was read over to Mr. *Fielding*, and he deſir'd a Copy of it; and he came again a few Days after, and had a Copy of it.

Mrs. *Deſean* ſworn.

She depos'd, That about *Bartholomewtide* was Twelvemonth, Mr. *Fielding* came to her Houſe, in the Country, and deſir'd a ſight of the Gardens; that her Butler came up and acquainted her, that Mr. *Fielding* was below, and he came under the Character of a Major-General: That ſhe had no

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Acquaintance with Mr. *Fielding*, and did not see him her self, but a Lady in Court saw him out of the Window, and Mr. *Fielding*, it seems, took her for her self.

Council. Did not Mrs. *Villars* come to you with a Message, that my Lady Dutchess of *Cleveland*, and Mr. *Fielding* desir'd to see your Gardens?

Mrs. *Delean.* She did so, some little Time after Mr. *Fielding* had been there, I believe.

Council. Did Mrs. *Villars* use to cut your Hair?

Mrs. *Delean.* No; her Mistress did.

Council. Who receiv'd the Letter from Mr. *Fielding*?

Mrs. *Delean.* Some of the Servants: I was then at my Father's, and had left Orders that they shou'd take in no Letters, but such as came from my Relations. Here's the Lady that saw him out of the Window.

A Lady sworn.

Council. Madam, Do you remember when Mr. *Fielding* was at *Waddon*?

Lady. He was there about *Bartholomewtide* was *Twelvemonth*; I saw him thro' a Window, and inform'd my Cousin of it.

Boughier. Mr. *Fielding*'s Man, sworn.

Boughier's Evidence, Mr. Fielding's Valer. He depos'd, That on the 29th of *October* was *Twelvemonth*, being the Lord Mayor's Day, he went with Mr. *Fielding* to my Lord Mayor's Show, and they stood at Mr. *Fielding*'s, a Linen-Draper's, in *Cheapside*, and he saw Mrs. *Villars* in the Balcony there: That in the Evening Mrs. *Villars* and a Lady came to Mr. *Fielding*'s Lodgings, and soon after Mr. *Fielding* came in, and complimented the Lady, and ask'd her if she lov'd Singing, and *Margaretta* was sent for, and sung two Songs, and Mr. *Fielding* having treated them with a Bottle of Wine and a Plumb Cake, the Lady and Mrs. *Villars* went away in a Mourning-Coach, that waited for them; and the Lady was in a Mourning Dress: That some Time after, his Master order'd him to be at home, and get clean Sheets for the Bed, Wax-Candles, and Sconces, and Fires in both the Rooms, and

and said some Ladies would be there at Night, and order'd the Deponent, if he was not at home when they came, to tell them he wou'd be there presently: That the Ladies came accordingly, and soon after Mr. *Fielding* came, and went up to them, and directed the Deponent to bespeak a Dish of Pickles; and Mr. *Fielding* went out again, and came back in a Hackney-Coach, with a Priest with him, in a long Gown, a long Beard, and a fur Cap, who belong'd to the Emperor's Envoy: That then they went to Supper, and when Supper was over, Mr. *Fielding* order'd the Deponent to fetch Water, Salt, and Rosemary, and he brought Water and Salt, but cou'd get no Rosemary; then the Deponent was order'd down, and Mr. *Fielding*, the Priest, and the Ladies, were lock'd in three quarters of an Hour; after which, the Deponent was call'd up to fill some Wine, and he perceiv'd a Ring upon the Lady's left Thumb, which she had not before Supper: That the Priest went away, and presently after Mr. *Fielding* order'd the Sheets to be taken off his Bed, and laid upon the other Bed for Mrs. *Villars*: That Mrs. *Villars* put the Lady to Bed in Mr. *Fielding*'s Bed, and in the Morning the Deponent was call'd to make a Fire, and he saw Mr. *Fielding* and the Lady in Bed together; and when the Lady was up, she went away in a Hackney-Coach: That about a Fortnight after, Mrs. *Villars* and the Lady came to his Master's Lodgings again, and suppd, and lay there, and he saw his Master and the Lady in Bed together the next Morning; and the Lady and Mrs. *Villars* went away in a Hackney-Coach: (This was about the 25th of November:) That soon after this, the Deponent understood, by the Dutchess of *Cleveland*'s Servants, that Mr. *Fielding* was marry'd to the Dutchess, and Mr. *Fielding* order'd the Deponent to bring his Cap, Gown, and Slippers, to the Dutchess of *Cleveland*'s House, and to attend the next Morning, with clean Linen, his Wig, &c. That about the 5th of December, Mr. *Fielding* bid him get his Lodgings in order again, for he expected Mrs. *Villars* and the Lady there,

there, and accordingly they came; and the Depo-
nent was sent to the Dutcheſs of *Cleveland's* for
Mr. *Fielding's* Night-Gown, Cap, and Slippers;
and Mr. *Fielding* and the Lady lay together again
that Night, and the next Morning the Lady went
away in a Hackney-Coach.

Council. Was you at *Epsom* with Mr. *Field-
ing*?

Bouchier. I was with him there, and went to
Waddon with him; and Mr. *Fielding* walk'd in
Mrs. *Delsan's* Gardens.

Mr. Fielding. Did not you see that Priest at
the Dutcheſs of *Cleveland's*, that you ſay was at
my Lodgings?

Bouchier. I can't ſay I ſaw him often at the
Dutcheſs of *Cleveland's*, but once I'm ſure I
did.

Mr. Fielding. Whoſe Servant are you now,
and how came you here as a Witneſs?

Bouchier. I am now Cook to Col. *Webb's* Regi-
ment, and my Maſter directed me to go to the
Duke of *Grafton's*; and His Grace told me I was
to teſtify the Truth of what I knew of Mr. *Field-
ing's* Marriage.

Mr. Fielding. I deſire to know if he did not
lie with Mrs. *Villars* that Night he made the Bed
for her?

Mrs. Martin ſworn.

She depoſ'd, That the beginning of *October*
was Twelvemonth, Mr. *Fielding* came to lodge at
her Siſter, Mrs. *Heath's*, Houſe, in *Pall-Mall*, and
that the next Day after the Lodgings were taken,
Mrs. *Villars* came to aſk for the Major General,
and continu'd coming almoſt every Day, as long
as he was in the Houſe: That on my Lord Mayor's
Day at Night, Mrs. *Villars* came, and another
Gentlewoman with her, but they did not ſtay all
Night ----- That ſome Time in *November*, Mrs.
Villars and the ſame Lady came to the Lodgings
again, and ſhe believes they ſtaid all Night then:
That while they were there, a tall Man knock'd at
the Door, in a long Gown fac'd with blue, and a
fur Cap, and a long Beard, and he was conducted

up

up Stairs to the Major General's; and she remembered they had a Dish of Pickles for Supper, and Mr. *Fielding's* Servant was order'd to make ready a Bed, and put on clean Sheets.

Mr. J. Powel. Do you believe there was any Marriage that Night?

Mrs. Martin. I know nothing of the Marriage.

Mrs. Heath sworn.

She depos'd, That in the beginning of October was Twelvemonth, Mr. *Fielding* came to lodge at her House, and Mrs. *Villars* came frequently to him thither, and that on my Lord Mayor's Day at Night, another Gentlewoman came with Mrs. *Villars*, as her Family inform'd her, and *Bouchier* told the Deponent, it was a Woman of Quality; and Mrs. *Villars* came down that Night the Man in Red was there, and said her Lady was a Person of Quality, and worth 80000*l.* and shew'd them a little Picture, which she said was her Lady's Picture: And she desir'd that the Lady and she might lie in the Room two pair of Stairs, because they had staid late; and said the Deponent shou'd have no Trouble, for *Bouchier* shou'd make the Bed; and the General's Sheets shou'd serve them.

Council. Do you remember that Mr. *Fielding* rail'd at Mrs. *Villars*?

Mrs. Heath. He came to me since he discharg'd Mr. *Fielding* the Lodgings, and said Mrs. *Villars* was a bad Woman, and had impos'd a Woman of the Town upon him, for a Woman of Quality, says he, Damn upon her, she is a Bitch, I don't know how she contriv'd it, but I thought I saw the Lady look out of a Window, at a Person of Quality's House in the Country.

Mr. J. Powel. Did you hear or believe they were married?

Mrs. Heath. I thought they were about to make a Convert of the Woman, by their asking for Salt, and Water, and Rosemary, and there being a Priest above; I did not think it to be a Marriage.

Mrs.

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Mrs. *Margaretta* sworn.

She depos'd, That Mr. *Fielding* left a Direction, for her to come to his Lodgings one Evening, intimating that some Persons of Quality were there; and she went, and sung several *Italian* Songs, and one *English* one, viz. *Ianthe the lovely*, and Mr. *Fielding* said he had the Original of it, and had translated it out of *Greek*.

Council. Who was then in the Room?

Margaretta. There was only one Gentlewoman in Mourning; she had a Velvet Scarf on; she sat by the Fire, and I saw only her Back; nor did I hear her speak a Word.

Mrs. *Price* sworn.

She depos'd, That she liv'd at Mrs. *Heath's*, and the last Lord Mayor's Day was Twelvemonth, she saw a Mourning-Coach come thither, and Mrs. *Villars*, and another Lady, who came out of it, were lighted up to Mr. *Fielding's* Lodgings; and Mrs. *Villars* came down and ask'd for the General, and in the mean time *Bouchier* came in, and said he would be there presently; and accordingly Mr. *Fielding* came in; and the Ladies continued there some Time: That a little while after they came again, and Mrs. *Martin* told the Deponent she let in a Gentleman in Red, in an *Armenian* Habit; and *Bouchier* said he was a Priest: That the Ladies staid all Night, and clean Sheets were put upon the Bed, and Lodgings prepar'd for the Lady and Mrs. *Villars*.

Thomas Sone sworn.

He depos'd, That Mr. *Fielding* bought a Ring of him, about a Year since, and order'd the Posy to be *Tibi soli*, and the Deponent engrav'd it, while Mr. *Fielding* took a Turn or two, and deliver'd it to him.

Mr. *Wilkins* also was sworn, and depos'd, That he was by, when Mr. *Fielding* bought the Ring of Mr. *Sone*, and order'd the Posy to be *Tibi soli*.

Here the Ring was produc'd, and the Goldsmith depos'd, it was the same he sold Mr. *Fielding*; and a Proctor being sworn, depos'd, That it was the same Ring, which Mrs. *Field-*

Fielding (alias Wadsworth) brought to Doctor's-Commons.

Constantine Pozzy sworn.

He depos'd, That he was Servant to the Emperor's Envoy Count *Gallas*, and that in the beginning of *November*, Mr. *Fielding* came to the Envoy's, and enquir'd for the Father in Red; but that Father not being within, the Deponent call'd Father *Florence*, another of the Envoy's Chaplains, to Mr. *Fielding*, and when they had talk'd some Time together in the Hall, Mr. *Florence* went up to Count *Gallas*, and while he was gone up Stairs, the Father in Red came in, and Mr. *Fielding* and the Father in Red went away together in a Hackney-Coach.

Mr. Florence sworn.

He depos'd, That one *Friday* Night, the beginning of *November*, *Pozzy* came and told him, Major General *Fielding* wanted one of the Chaplains, and when the Deponent came to him, Mr. *Fielding* told him, in *French*, he came to look for the Father in Red, but he wou'd do as well, if he wou'd go along with him: That Mr. *Fielding* also told the Deponent, he had courted a young Lady some Time, and now found her well-dispos'd, and therefore desir'd the Deponent to go with him and marry them. That the Deponent knowing there had been some Treaty between the Dutchess of *Cleveland* and Mr. *Fielding*, he ask'd if it was to the Dutchess, but Mr. *Fielding* did not inform him: That the Deponent then went up to ask his Lord's Leave, but when he came down again he understood that Mr. *Fielding* and the Father in Red were gone away together.

Matthew Paul sworn.

He depos'd, That about the latter end of *May*, Mr. *Fielding* alighted out of a Chariot at *White-Hall* Gate, and at the same Time two Women came out of a Hackney-Coach, and one of them came up to Mr. *Fielding*, and he call'd her, *Bitch*; and she call'd him, *Rogue*, and said she was his lawful Wife; and Mr. *Fielding* punch'd his Stick against her Mouth, and made her Teeth bleed, and he

he offer'd the Centries at the Gate a Crown to keep her while he was gone; but she saying she was his lawful Wife, they did not care to meddle with her.

Here Mrs. *Fielding* (alias *Wadsworth*) appearing in Court, this Witness depos'd further, That he really believ'd this to be the Woman who met Mr. *Fielding*.

Mr. *Seymour* sworn.

He depos'd, That he saw Mr. *Fielding* beat this Woman at *White-Hall* Gate, last Summer; and that she call'd him, *Rogue*, and said she was his lawful Wife.

Captain *Eaton* sworn.

He depos'd, That the latter end of *June*, or the beginning of *July*, (before the Difference between my Lady *Dutchess* and Mr. *Fielding*) this Mrs. *Fielding*, and another Woman she call'd Mother, came to him to the *King's-Arms* Tavern, and told him she was married to Mr. *Fielding*, before he was married to my Lady *Dutchess*, and desir'd the Deponent to acquaint the Duke of *Northumberland* with it, that the *Dutchess* might know it: And that Mrs. *Fielding* added, she had been much abus'd by Mr. *Fielding*.

Three Letters produc'd, that he sent his Wife.

Then three Letters which Mr. *Fielding* wrote to his Wife, were read in Court, being prov'd by *Bouchier* and Mr. *Beale*, to be his Hand-writing.

First Letter.

To the Countess of *Fielding*, Sunday Night.

I Hope my dearest Wife will easily believe, that nothing can be welcomer to me than the Assurance of her Health; but as I receiv'd hers but this Day, I cou'd not have the felicity of seeing her to Morrow, and she have Notice of it, therefore, if she thinks fit, on Thursday next, at Four a Clock, I will see her at Puggy's, and there endeavour to repair this tedious Absence.

Eternally your own,

FIELDING.

To

Friday.

To my dearest Wife, the Countess of Fielding,
I Had return'd my dear Wife's Favour long before now, but my Lady Dutches's Sickness, on one Hand, and more than ordinary Business, on the other, has not given me a Moment of Time to write to my Love. Puggy brings you the Sett of Knots you desir'd, and the Pattern of the Damask, or if my dearest Life wants any thing else, she may with Pleasure command it, for I am never so well pleas'd, as when employ'd by my dearest Wife, and must be ever,

Her affectionate Husband, till Death,

FIELDING.

Nov. 27. 1705.

THE last Letter I had from my dearest Wife, has mortified me much; finding, that notwithstanding all my Kindnesses, she taxes me with Coldness in my Letters, which, I call Heaven to Witness, I never in the least intended, and beg my Dearest to give me some Warning, before she taxes me with Unkindness. Puggy tells me, that my Dear designs to come to Town to Morrow, which I hope she will put off till another Day, because I am oblig'd to be at Her Grace's to Morrow, all the Afternoon, and till late at Night, but any other Day my Dear shall find she is always welcome to the Arms of him, who loves her more than Life it self; and I shall never fail of giving her fresh Proofs that I am,

Her loving, and

affectionate Husband,

FIELDING.

Council. Mrs. Villars, do you know these Letters were wrote by Mr. Fielding, to his Wife?

Mrs. Villars. I saw Mr. Fielding write them, and he deliver'd them into my Hands, and order'd me to deliver them to his dear Wife.

Council. Who does he mean by Puggy, in his Letters?

Ms.

Mrs. Villars. He us'd to call me *Puggy*.

Mr. J. Powel. *Mr. Fielding*, now is the Time to make your Defence.

Mr. Fielding's
Defence.

Mr. Fielding. My Lord, *Mrs. Villars* is the only positive Evidence against me, and she has forsworn her self, in swearing she cut *Mrs. Delean's* Hair, for *Mrs. Delean* her self says she never cut it; and I can prove that *Mrs. Villars* has been in *Bridewel*, and receiv'd the Correction of the House, and therefore I think she is not fit to give Evidence in this Court: And as to this *Mrs. Wadsworth*, whom they set up, I shall show she was married to one *Bradby*.

Mr. J. Powel. *Mrs. Villars* is an ill Woman, no doubt, in that she put this Woman upon you for a Woman of Quality; but her Evidence is well supported by Circumstances, and bids fair for a Proof you were married to this Woman; but if you can prove that *Mrs. Wadsworth* was married to another Man at the same Time, it will be to the Purpose.

Elizabeth Basset sworn.

He endeavours
to prove *Mrs.*
Wadsworth
married to
another be-
fore she mar-
ried him.

She depos'd, That her Father-in-law was Clerk of the Fleet-Prison, and kept the Register of the Marriages there; but her Father having been sick, the Deponent had the Register in her keeping the last Year; and that about two or three Months ago a Woman came to the Deponent's House, and said there was a Marriage in the Book, of one *Lilly Bradby* and *Mary Wadsworth*, and offer'd the Deponent a piece of Money, if she wou'd strike it out of the Book.

Council. Is this the Woman that made you this Offer?

Mrs. Basset. I will not swear to the Woman, I never saw her but that Time, but I believe it is.

The Certificate of the Marriage read.

Lilly Brady marry'd to *Mary Wadsworth*, the 28th of October, 1753. The Man of St. James's, the Woman of St. Margaret's, Westminster.

Mr. J. Powel. Who us'd to write the Certificates in the Register?

Mrs.

Mrs. Basset. Several People we hired to do

Council. Whose Hand is this Certificate?

Mrs. Basset. It is my Father in Law's.

Council. Is the whole Leaf of his Hand-writing.

Mrs. Basset. I cannot tell.

The Certificate view'd by the Court, and found to be a different Hand from the rest.

Council. Did you show the Gentlemen this 755.
Book, who came to examine the Register?

Mrs. Basset. I did not; because *Mrs. Wadsworth* said there wou'd be some Trouble about it.

Council. Do you keep two Books for Registering the Marriages of the same Year?

Mrs. Basset. Yes, there are several Ministers, and each has his particular Book.

Mrs. Drinkwater sworn.

She depos'd, That she had known *Mrs. Villars* above a Year, and that she gave out she was married to Colonel *Fielding*, the 5th of *November* was Twelvemonth, and that she was with Child by him: And that *Mrs. Villars* told the Deponent, That the Dutchess of *Cleveland* offer'd to give her 200*l.* and 100*l.* a Year, for fifteen Years, if she wou'd prove a Marriage with *Mr. Fielding*: And that *Mrs. Villars* said she wou'd do more for *Mr. Fielding* for 40*l.* than she wou'd for the Dutchess of *Cleveland* for a much greater Sum; and that it was pure Want that made her comply with my Lady Dutchess: And the Deponent added, She had read all the Letters between *Mrs. Villars* and the Colonel; and she never heard of a Marriage between *Mrs. Bradby* and *Mr. Fielding*, but between *Mr. Fielding* and *Mrs. Villars*.

Sir Ja. Montague. How long is it since *Mrs. Villars* said these Things to you?

Mrs. Drinkwater. Three Months, or better; she invited me to her Lodgings, and there this Discourse happened.

Council. How long have you been acquainted with Col. *Fielding*?

Mrs. Drinkwater. But since this Thing happened.

pen'd, nor have I had any other Conversation with him, than to speak to him, in Mrs. Villars's Behalf, but I can say this further, That an Outlandish Man came to me about a Fortnight since, and said, If I cou'd do any thing for the Dutcheſs, of *Cleveland*, it wou'd be a considerable Sum of Money in my Way.

Council. Where do you live?

Drinkwater. I live in the same House, where Mrs. Villars lodg'd, by *Red-Lyon-Square*, and am Servant to one Captain *Howard*, who is now in the Service.

Mrs. English sworn.

Mr. J. Powel. What have you to say?

Evidence of
Mrs. Villars's
pretending
she was married
to Mrs.
Fielding her
self.

Mrs. English. I wash for Mrs. Villars, and the Day after Valentines-day, I went to her for some Money, and she said she had none at present, but wou'd send to her Spouse for some; and a Gentleman came in, and said, *I have none for you, but my Master says if a Crown will do, he will send it you out of Charity, but he cannot supply your Extravagancies.* That Mrs. Villars said she was married to Mr. Fielding, on the 5th of November, and she wou'd have Money of Mr. Fielding, or she wou'd send her Soul to the Devil.

Mrs. Fletcher sworn.

757. She depos'd, That Mrs. Villars liv'd with her a Twelvemonth, about four Years ago; and that she confess'd she had two Bastards, one by my Lord Torrington, and another by my Lord Stamford; and that she had been in *Bridewel*.

Sir Ja. Montague. Wou'd you have a Correspondence with a Woman that had two Bastards? Pray what is your Way of Living?

Mrs. Fletcher. My Husband is a broken Merchant, and allows me 20*l.* a Year.

Council. You wou'd not scruple to assist Mr. Fielding, if he wanted a fair Lady: Is that Letter your Hand-writing?

Here a Letter being shewn her, she own'd it to be her Writing. See the Letter, Numb. 759.

Mrs.

Mrs. Gardener sworn.

She depos'd, That *Mrs. Villars* lodg'd at her House, and that she came home the 6th of *November* was *Twelvemonth*, and told the Deponent, she was married to *Col. Fielding*; and she gave Gloves, Garters, and Favours in the House; but desir'd the Thing might be a Secret: That about a Fortnight before Christmas, *Mrs. Bradby* came to *Mrs. Villars's* Lodging, and happen'd to fall down, and within a few Days she fell in Labour.

Mr. J. Powel. How can you swear this?

Mrs. Gardener. I may say it, for *Mrs. Villars* told me so, and the Midwife said she deliver'd her, for which *Mrs. Bradby* gave her a Guinea; and I saw she was big.

Mrs. Drinkwater depos'd further, That she was at *Mrs. Bradby's* Labour, a Fortnight before Christmas; but she cou'd not tell whether she had a Boy or a Girl, a live Child, or a dead one.

Mrs. Villars being call'd again, said, she knew that *Mrs. Fielding* miscarried, but it was after Christmas.

The Keeper of the House of Correction at *Westminster* being sworn, depos'd, That *Mrs. Villars* was in his Custody, about five Years since; but said, she had not the Correction of the House, because she was then with Child.

Mr. Minors sworn.

He depos'd, That in *October* was *Twelvemonth*, he us'd to be at *Mrs. Heath's*, where *Mr. Fielding* lodg'd, and that *Mr. Fielding* gave him Instructions for the drawing of Writings between him and the Dutchess of *Cleveland*: That he saw abundance of the common Women of the Town at the Lodgings, but he did not perceive *Mr. Fielding* took more Notice of *Mrs. Bradby*, than of the rest, and added, That he din'd with *Margaretta* at the Lodging, about *October* was *Twelvemonth*. 758.

Mr. Cholmley sworn.

He depos'd, That about a *Twelvemonth* since, a Woman was taken up, whose Name was *Villars*, and he believ'd this to be the same; and that he had often seen her abroad at a lewd Time of Night.

Mr. Florence being further examin'd, whether Father Dryan [the Father in Red] cou'd speak *English*, said, he cou'd speak very little, but that he believ'd he might say the Words, *I take this Man for my Husband*, if another said them before him.

Sir J^a. Montague then made some Observations on the Evidence that had been given: He said, That they did not pretend that Mrs. Villars was a Woman of a good Reputation, but that there were such concurring Circumstances to confirm her Testimony, that the Truth of what she had sworn cou'd not be disputed: and that Mr. Fielding had not at all contradicted the Facts that had been prov'd, he had given no Account how he came by the Ring, or for what Purpose he bespoke it; and he seem'd to admit he had been foolish enough to be impos'd upon by these intriguing Women, in that part of his Defence, where he endeavour'd to shew that this Mrs. Wadsworth was before married to one Lilly Bradby, but he had not given any Account there was such a Man in the World, as this Bradby: That this Entry in the Fleet Register, was, probably, a counterfeit Entry, being written in the lower part of the Leaf, and in a different Hand from those of the whole Year besides: That they had search'd this very Book, and there was no such Entry then made, that this Place was then blank, and fill'd up since. And he observ'd further, That Mr. Fielding had not produc'd one Witness, who was by at this pretended Marriage: That it was not controverted, but Mrs. Fielding might be with Child, for it had been prov'd, that Mr. Fielding had lain with her several times, and his Abilities were not suspected: That Mr. Fielding knew she was with Child by him, and was the proudest Man in the World of it, as appear'd by the following Letter.

Here the Letter was read.

14 Nov. 1705.

To the best of Wives, Anne, Countess of Fielding, at Waddon.

Mr. Fielding's
fourth Letter
to his Wife.

There is nothing can please me more upon this Occasion, than to hear my dearest Wife say I

had

had made her sick, by turning her Liver; for without that, we cou'd not hope for a young Lord Tunbridge, which wou'd be, the next to my Dear her self, the most welcome Present to my Arms: Make haste then, my dearest Life, to cultivate the young Spark, and be sure you don't starve my Boy. As for your coming to me, it wholly depends upon your self, who can best judge when it is most proper to come to me; which you can do by giving out you are to stay all Night in London; and then you and Puggy have nothing to do, but to come to me at Bed-time, and so we may go to Bed, and lie till Morning, when Puggy may come again and call you. Adieu, my Soul's Love, whom I must ever value more than Life.

FIELDING.

Sir *Ja. Montague*. It must be observ'd, that Mrs. *Delean*, whom Mr. *Fielding* thought he had married, her Name is *Anne*, but Mrs. *Fielding's* Name is *Mary*.

Mr. *Longford* sworn.

He depos'd, That he search'd the Register in the *Fleet*, for the Certificate that had been produc'd in Evidence, and he believ'd that to be the very Book they saw, which was in Court.

Mr. *Rescorloe* sworn.

He depos'd, That he went with Mr. *Longford*, by the Attorney General's Order, and search'd the Books in the *Fleet*, to find this Marriage of *Lilly Bradby* with Mrs. *Wadsworth*; that the Woman who gave her Evidence, brought them this very Book, and they found no such Entry as she shew'd now; and she told them, that there was no other Book, nor had any such Certificate been entred, and she said, a Man and a Woman had been to search for it a Fortnight before: That they search'd the Month of *October* very strictly, and the Depo-
nent took particular Notice of the Blank where this Certificate was now entred; and that this must be the very Book, because he then observ'd, the Year 1705 was put before the Year 1704, as it appear'd to be here.

The TRIAL of

Sir *Ja. Montague*. I desire the Letter may be read, which Mrs. *Fletcher* sent to Mr. *Fielding*, and acknowledg'd to be her own Hand-writing.

The Letter was read accordingly, in which there was nothing material but the Post-script, viz.

I long to see you, I am now acquainted with a young Lady that's pretty, and lives in good Fashion; Your Honour will oblige me, in letting me receive your Commands.

Mr. J. *Powel* Then Mr. J. *Powel*, having, repeated the Evidence that had been given, as well for, as against the Prisoner, gave his Directions to the Jury, and acquainted them, that if they did believe

761. that Mrs. *Wadsworth* was marry'd to *Bradby*, at the Time Mr. *Fielding* marry'd her, then he was not within the Statute: But this, he said, he thought was not sufficiently made out.

762. Mr. *Fielding* is convicted. The Jury having withdrawn for some Time, brought Mr. *Fielding* in Guilty: But the Court suspended the giving Judgment, till next Sessions, and accepted Bail for Mr. *Fielding's* Appearance.

Prays to have the Benefit of his Clergy. The next Sessions, being the 15th of *January*, Mr. *Fielding* appear'd, and it being demanded, what he cou'd say, why Judgment of Death shou'd not pass upon him? He pray'd the Benefit of his Clergy, which was allow'd; and he pro-

The burning in the Hand in the Hand; and was admitted to Bail. suspended.

The Dutcheſs of *Cleveland* Her Grace the Dutcheſs of *Cleveland* having alſo ſo inſtituted a Cauſe of Nullity of Marriage, obtains a Sentence of Nullity of Marriage, againſt the ſaid Mr. *Fielding*, by reaſon of a former Marriage with the ſaid *Mary Wadsworth*, in the Arches Court of *Canterbury*, ſhe did proceed to obtain the Sentence of the ſaid Court: And accordingly, on the 23d of *May*, 1707, the Right Worſhipful Sir *John Cook*, Kt. Doctor of Laws, Official Principal of the ſaid Court, Judicially Sitting in the Great Hall of *Doctōr's-Commons*, in the Preſence of the Duke of *Grafton*, the Duke of *Northumberland*, the Earls of *Litchfield*, *Suffex*, and *Jerſey*, and the Lord *Quarrender*, and alſo of

of the respective Proctors of Her Grace the Dutchess of *Cleveland*, and of Mr. *Fielding*, did, at the Petition of Her Grace's Proctor, read and promulge his Definitive Sentence in *Latin*, viz. *In Nomine Domini, Amen, &c.* Wherein, after Process and Grounds on which the Sentence is founded, is recited, he concludes, *We do pronounce, decree and declare, that the said Most Noble Lady, Barbara, Dutchess of Cleveland, was, and is, free from any Bond of Marriage with the said Robert Fielding, and had, and hath, the Liberty and Freedom of marrying with any other Person.*

763.

Sign'd,

John Cooke.

And Mr. *Fielding* did, by his Proctor, renounce He renounces all Benefit of Appeal from the said Sentence: And all Benefit of the Gold Ring, and seven Letters, that had been Appeal. exhibited on the Part of the Lady Dutchess, were redeliver'd her; the Letters being first Registered in Court,

M 3

The

764. *The Trial of JAMES STIRLING, Laird of Keir; ARCHIBALD SEATON, Laird of Touch; ARCHIBALD STIRLING, Laird of Carden; CHARLES STIRLING, Laird of Kippendavie; and PATRICK EDMONSTON, of Newton: Before George, Earl of Cromerty, Lord Justice General, and the rest of the Lords of Justiciary, at Edinburg, the 15th of November, 7 Anna, 1708.*

The Indictment, for rising in Arms, and encouraging the Invasion threatened by the Pretender and the French, and corresponding with them, when they were upon the Coast.

765.

THE Indictment was preferr'd at the Instance of Sir *James Stuart*, Her Majesty's Advocate, and set forth, That the Prisoners, shaking off all Fear of God, and Regard to Her Majesty's Person, Authority and Laws, upon one or other of the Days of the Months of *February, March, or April* last, when an Invasion of that Part of *Great Britain* call'd *Scotland*, was threatened by the *French* and the Pretender, did convocate and convene in Arms, with others their Accomplices, (in the Indictment named) who are absconded, and declar'd Fugitives: And did thus rise and continue in Arms, without Her Majesty's special Authority first interpon'd, and did levy War against Her Majesty, and did correspond with the said Enemies and Invaders, at the very Time of their said Invasion, and did march in a Body, with their

their said Accomplices, several Days and Nights, to and from several Places in the Shires of *Stirling*, *Perth*, and other Shires adjacent, on Purpose to encourage and strengthen the said Invaders, or at least to raise Her Majesty's other Subjects in Rebellion against her; and to that end, did openly drink the good Health of their Master, as they call'd him, who cou'd be no other than the Pretender. And this they did in order to depose Her Majesty, and alter the Succession of the Crown, so happily settled, by Law, upon Her Majesty, and her Successors. By all which, they and each of them were guilty of Treason, Rebellion, and Lese Majesty; at least, of Treasonable Rising and Convening in Arms, without Her Majesty's special Authority first had, and ought to be condemned by Sentence and Doom of the said Lords Commissioners, to forfeit their Lands, Lives, and Goods, as Traitors, and be otherwise punish'd in their Persons and Goods, by the Pains of Law, To the Example and Terror of others to commit the like in Time coming.

Sic Subscribitur,

Ja. Steuart.

The Lord Advocate produc'd in Court Her Majesty's Letter, directed to him, authorizing and requiring him to commence the aforesaid Process: Which being read in Court, was order'd to be recorded.

Then the Prisoners Petition, That Council might be assign'd them, was read in Court; and an Order was made, That the Prisoners shou'd have such Council as they shou'd think fit to employ. 766:

After which the said Indictment having been read and debated, in the Presence of the Lords of Justiciary, it was order'd, That the Prisoners shou'd give in their Information (or Plea) the *Wednesday* following; and Her Majesty's Advocate shou'd give in his the *Friday* after. And then the Court adjourn'd till *Monday*; having order'd the Affizers [Jurors] and Witnesses to attend then, on Pain of

100 l. each: And the Prisoners were remanded to Prison.

The Information (or Plea) for the Laird of Keir, and the other Prisoners.

The Prisoners
Exceptions to
the Indict-
ment.

They say, That the Indictment is not Relevant (or is Insufficient) in regard it does not alledge any overt Act, amounting to High Treason, to be done by them: That there were neither Words, Writings, or Deeds, specified in the Indictment, that cou'd possibly be construed to infer the Crimes libell'd.

That it was not alledg'd they had rais'd Forces, or dispos'd them under Colours; nor was it set forth, that they were an Hundred Men, and upwards, under weekly or daily Pay: which were Circumstances necessary to make their Rising Treasonable.

And as to their corresponding with the Enemy, there was no particular Act of Correspondence mention'd in the Indictment; which there ought to have been to support that Charge.

767. Nor cou'd their Travelling together for some Time in the Country, be construed a Design of encouraging Enemies, and to raise the Subjects in Rebellion, since they were no otherwise appointed or attended, than as they, and others of their Character, usually travel, in a most peaceable manner, without giving the least Occasion, either by Word or Deed, to any Rebellion, or Sedition: And as there was not any Body of Men in Arms, in the Kingdom, against Authority, to whom they cou'd be imagin'd to resort, so it was an Evidence they had no Intention to rise against Authority, for that they had not assembled their Tenants and Followers in Arms, either for assisting themselves, or giving Encouragement to others.

And as to their drinking to the good Health of their Master, that cou'd not support a Charge of High Treason, *First*, Because there was no Law against drinking any Person's Health: And, *Secondly*, Because no Person was named; and the Gloss put upon it, That it cou'd be no other than the

the Pretender, was only a Conjecture, and an uncertain Inference of the Prosecutor's.

It was reply'd by the Prosecutor, That the Indictment was not defective: For, *First*, It was expressly alledg'd, That the Prisoners did rise and continue in Arms, without Her Majesty's special Authority, which was Treason by the fifth Act Parl. 1 Car. 2. and the particular Circumstances of the said Rising in Arms wou'd appear in the Proof.

Secondly, That their marching in a Body, at the Time the Nation was invaded by a *French Fleet*, with Land Forces on Board, must be construed to be on purpose to encourage and strengthen the Invaders, and in open Correspondence with them, especially since the Prisoners shew'd no reasonable Cause of their Assembling and Travelling together.

Thirdly, That not only an actual rising, but an Attempt to rise in Arms, was High Treason: That in Treason *Conatus*, or an Attempt, was punishable with the same Pains as the consummate Crime: And, that there cou'd be no Objection to the Generality of the Indictment, since Art and Part were libell'd.

It was duply'd (or rejoin'd) for the Prisoners, The Argument That it ought to have been shewn in the Indictment, That the Prisoners did *treasonably* rise in Arms, for as a Person could not be indicted of Murder generally, without shewing wherein, so neither cou'd one be indicted in general for rising in Arms without Authority; but the particular Facts and Circumstances must be specified, inferring the respective Crimes; *First*, For that the Prisoners wou'd be depriv'd of all Opportunities of clearing themselves, if the Charge was so general: *Secondly*, That then the Assize (or Jury) wou'd become Judges of the Sufficiency of the Indictment, as well as of the Proofs.

That the Prisoners travelling from their own Houses, for some Space, either for Diversion or Business, in a peaceable manner, happening at a Time when an *Invasion was threatned*, cou'd not alter the Nature of the Fact, and it is not alledg'd in the Indictment, That the Prisoners knew of any

Inva-

Invasion intended, or that the *French* were upon the Coast; and without this Circumstance, it was admitted by the Prosecutor, their Travelling with their usual Equipage and Attendance cou'd be no Crime at all, or give any Suspicion of their rising in Arms against the Government, and if it did, 768. Suspicions alone were not sufficient to ground a Charge of High Treason upon.

That there was no Occasion to give any Account of the Reason of their Progress, but it was sufficient for them to say, That their meeting and travelling together with Swords and Pistols, as they were us'd to do, did not infer a rising in Arms, or cou'd give the least Jealousy to any Person; and if this were not sufficient, the natural Liberty of the Subject wou'd be very much restrain'd, and no Man cou'd be sure that the most innocent Action of his Life shou'd not be fatal to him, and bring him under a Charge of Treason.

That altho' it be generally received, That an Attempt, or *Conatus*, in Treason, is punishable as Treason, yet that *Voluntas*, or *Conatus*, mention'd in Law, must break out into an external Act, of which human Laws may take Cognizance, for altho' *Dolus*, or *Propositum*, be requisite in all Crimes, yet not as it is latent in the Mind, but as it is express'd and declar'd by an external Act: And as in the present Case, the Prisoners had truly no ill Design, so they were not charg'd with any Words or Actions in the Indictment, that cou'd infer any Design in them to commit any thing contrary to Law, or their Duty to their Sovereign; for as they us'd their natural and innocent Liberty of Travelling in a peaceable Manner with their near Relations and Neighbours, so when they were call'd by Authority, they did not absent or withdraw themselves, but readily appear'd upon the first Citation.

That the libelling of Art and Part did not answer the Objection, Of the Charge being too general; for that Art and Part related to the particular Fact libell'd, and included an Alternative; that the Person complain'd of was either Actor or Art and Part of the Criminal Facts particularly libell'd;

bell'd; and such general and indefinite Allegations were not warranted either by Law or Custom.

As to the drinking of Healths, Correspondence, or inciting an Insurrection, it was not necessary to say any thing, because my Lord Advocate in the Debate charg'd these Facts only as Aggravations, which was of no Moment in a Process of Treason, and cou'd be of no Effect in this Case, where the Crime charg'd was so manifestly avoided. 769

Sic Subscribitur,

Alex. Mcleod.

Information for Her Majesty's Advocate against the Lairds of Keir, Touch, and others, now Prisoners in Her Majesty's Tolbooth of Edinburgh. The Arguments of Her Majesty's Advocate for the Queen. 770

Her Majesty's Advocate grants, That neither inward Thoughts or Intentions, unless some way express'd or declar'd, can be made Criminal, much less Treasonable; but when an Act of Parliament has specified a certain Fact, such as rising and continuing in Arms, without Her Majesty's Authority, and has declared this shall be an Evidence of the Parties treasonable Intention, such a Rising and Continuing in Arms is a sufficient overt Act, and there requires nothing more to declare or express the Rebels Intention: The Act requires no other Circumstance to explain or discover a treasonable Intention, than the rising and continuing in Arms, without Her Majesty's Authority, as the Prisoners had done.

And as to that part of their Defence, That they were only a few Neighbours met together, for their Diversion, &c. He said, As the Action it self was condemn'd in Law, so were the Circumstances it was attended with, very strong against them; they left their own Houses, having no just Occasion to invite them abroad; and they met in such a Company as perhaps they had never met before; they met with Swords and Pistols of all sorts, better appointed than most Men go to War; that they were better mounted and arm'd than Men of their Circumstances were allow'd to be, by an Act of Parliament.

liament of 1693. That this happen'd when the Invasion was generally known, and the Enemy upon the Coast; that they march'd backwards and forwards several Days and Nights, hovering about in Expectation of something, and did not dissolve or go home till their Hopes of an Invasion were over; and since several of their Accomplices had absconded themselves.

772. The 22d Day of *November*, 1708. the Court being late, and having considered the Indictment, ver-rule the and the Debates thereupon, *They find*, That the Prisoners Ex-said Prisoners, their rising and continuing in Arms, ceptions to without Her Majesty's Authority, and actually the Indict- corresponding with an open Enemy, upon the ment, Coast, ready to invade this part of *Great-Britain*, call'd *Scotland*, relevant to infer the Pains of Treason, charg'd upon the Prisoners, and reject their Defence, and remit the whole to the Knowledge of an Affize (or Jury) and then the Court adjourn'd till the Afternoon.

773. The 22d of *November*, in the Afternoon, the Court being late, the Affize (or Jury) consisting of fifteen Gentlemen and Merchants, were sworn: Affize consisting of fifteen Gentlemen and Merchants, were sworn: After which the Evidence was given.

A Jury, consisting of fifteen Persons, charg'd with the Prisoners. The Evidence of the Prisoners being in Arms.

David Fenton, sworn.

He depos'd, That about the 21st of *March*, the Prisoners were at his House, at *Dunkeld*, some of them two Days, and others but one Day: That all of them had Swords, and some of them Pistols: That nine of the Company own'd themselves to be Masters, and there were seven Servants: That he did not hear any of them speak of the Government, or the Invasion that was then intended; and that he knows nothing of their Design in coming to his House, or why they were together: That when they went away, some of them went to the *East Boat*, on the Water of *Tay*, and others of them cross'd at the *West Boat*, in the Way to *Strathbrand*.

John Maccleran sworn.

He depos'd, That about the 15th of *March*, the five Prisoners were at his House, and he saw with them *William Graham*, *Alexander Stewart*, and a Brother.

Brother of *Touch's*, and remembers no others, but Servants: That all of them had Swords, and some of them Pistols, and some few had Guns: That they went to his House *Eastward*, towards *Lenie*; and that he did not hear them speak of any Person they expected to meet at his House, or heard them speak of the Government, or of King *James*, the Prince of *Wales*, or the *French* Invasion.

774

Daniel Morriſon, Servant to the Laird of *Keir*, sworn.

He depos'd, That about the Time mentioned in the Indictment, he saw the Prisoners, and some others, to the Number of ten or twelve Horse, at *Dunkeld*, and that they had Swords and Pistols, but no other Weapons: That *Keir* being inform'd that one *Campbel*, who commanded a Party at the Bridge of *Alan*, design'd to apprehend him and his Horses, occasion'd his going from Home with his Horses: That *Touch* was with him that Morning, and they met *Carden* and *Kippendavie* at the Bridge of *Turk*, and that *Newton* came there that Night; and from thence they went to *Lochearn*: That he heard them speak nothing of the pretended Prince of *Wales*, or the Invasion, and that *Keir*, *Carden* and *Touch* came home together from *Dunkeld*, the 23d of *March*; that *Carden* and *Newton*, nor any of the Servants, had either Sword or Pistol, except *Keir's* Man, who had a Sword.

Peter Wilson, Servant to the Laird of *Keir*, sworn.

He depos'd, That on the 17th of *March*, *Keir*, *Touch*, and others, to the Number of five, went from *Keir* to the Bridge of *Turk*, where *Carden* and *Kippendavie* met them; and they went next Day to *Appinadove*, where one Mr. *Hay* met them: And deposes, That the Occasion of *Keir's* going from home, was, his Apprehension of being seiz'd, with his Horses, by the Forces that lay at *Stirling*; That they heard Admiral *Bing* had chased the *French* off the Coast, before they went from *Keir*.

The Evidence being given, the Court order'd the Assize (Jury) presently to enclose, and bring in

in their Verdict the next Day, at Twelve a Clock.

The Prisoners are acquitted. The 23d of *November*, the Court being fate, the Affize brought in their Verdict, viz. Having considered the Indictment against the Prisoners, for the Crime of Treason and Lese Majesty, with the Debate thereupon, and the Depositions of the Witnesses, they all, in one Voice, find the Libel *Not proven*.

Sign'd,

Ja. Fleming, Chancellor [or Foreman.]

Gilbert Campbell, Clerk.

After opening and reading which Verdict of Affize, the Court associated (or acquitted) the Prisoners, and dismiss'd them from the Bar; whereupon they took Instruments.

Sign'd,

Cromertie. J. P. D.

775. *The Trial of Doctor HENRY SACHEVEREL, for High Crimes and Misdemeanors; began, at Westminster, on Monday, the 27th of February, 7 Annæ, 1709.*

THE Lords being come down in their usual Order, from their House above, to the Court erected for the Trial, in *Westminster-Hall*, the Serjeant at Arms made Proclamation for Silence: Then he made Proclamation for the Doctor to appear, and save his Bail, &c. Whereupon Dr. *Sacheverel* came to the Bar, and kneeled, his Council, Sir *Simon Harcourt*, Mr. *Dodd*, Mr. *Phipps*, Mr. *Dee*, and Dr. *Henchman*, standing near him; and the Lord Chancellor having commanded the Doctor to rise, Proclamation was made for

for the Prosecutors to appear, and make good their Charge against him.

Then the Lord Chancellor intimated to the Doctor, That it was needless to give him any Directions as to his Defence, the Lords having assign'd him Council; that they had also made an Order for summoning his Witnesses, and had admitted him to Bail, upon the first Application, that he might be the better able to provide for his Defence; and, that he had had all the Time he thought fit to prepare himself, and that he ought ever to remember their Lordship's Indulgence to him.

Then the Articles of Impeachment were read.

Articles exhibited by the Knights, Citizens, The Articles and Burgesses in Parliament assembled, in the against the Name of Themselves, and all the Commons of Great Britain, against Henry Sacheverel, Doctor in Divinity, in Maintenance of their Impeachment against him, for High Crimes and Misdemeanors.

The Preamble to the Articles set forth, *That The Preamble: whereas the late King William had undertaken a glorious Enterprize, for delivering this Kingdom from Popery, and arbitrary Power, and was assisted by divers Subjects of this Realm, well-affected to their Country, which Enterprize God was pleas'd to crown with Success, and the late happy Revolution did take Effect: And whereas this Enterprize had been approv'd by three several Acts, made in the first Year of the said late King William and Queen Mary, and the Actings of the said well-affected Subjects, in Aid and Pursuance of the said Enterprize, was declared to have been necessary, and that the same ought to be justified: And whereas the blessed Effects of the said Revolution were, the Enjoyment of our Religion and Laws, &c. the uniting Her Majesty's Protestant Subjects, by a legal Indulgence, or Toleration, the Settlement of the Succession of the Crown in the Protestant Line, and the Union of the two Kingdoms: And whereas the Lords and Commons had pass'd a Vote, That the Church establish'd (which was rescued from the extremest Danger by the late King*

King William) was now in a safe and flourishing Condition under Her Majesty, and that whoever shou'd suggest the Church was in Danger, was an Enemy to the Queen, the Church, and Kingdom, and had address'd Her Majesty, to take effectual Measures for publishing the said Vote, and punish the Authors of such seditious and scandalous Reports, and Her Majesty had issued her Proclamation accordingly: Yet the said Henry Sacheverel had preach'd a Sermon at the Assizes held at Derby, the 15th of August, 1709, and afterwards publish'd the same in Print, with a Dedication: And had also preach'd another Sermon, at St. Paul's, before the Lord Mayor and Aldermen, &c. on the 5th of November, which he published in Print, with a Dedication to Sir Samuel Garrard, Bart. Lord Mayor of the City of London, with a wicked, malicious, and seditious Intention to undermine and subvert Her Majesty's Government, and the Protestant Succession, defame Her Majesty's Administration, asperse the Memory of His late Majesty, to traduce and condemn the Revolution, arraign the Resolution of both Houses of Parliament, to create Jealousies and Divisions, and to incite the Subject to Sedition and Rebellion.

Art. 1. Article 1. That the said Henry Sacheverel, in the said Sermon preach'd at St. Paul's, did suggest and maintain, That the necessary Means us'd to bring about the Revolution, were odious and unjustifiable: That his late Majesty, in his Declaration, disclaim'd the least Imputation of Resistance and that to impute Resistance to the Revolution, was to cast black and odious Colours upon his late Majesty and the said Revolution.

Art. 2. Art. 2. That in his Sermon preach'd at St. Paul's, he did suggest and maintain, That the Toleration was unreasonable, and the Allowance of it unwarrantable: And asserted, That he is a false Brother, with Relation to God, Religion, or the Church, who defends Toleration and Liberty of Conscience: That Queen Elizabeth was deluded by Archbishop Grindal, (whom he scurrilously calls a false Son of the Church, and a perfidious Prelate)

to

to the Toleration of the Genevian Discipline, and that it was the Duty of superior Pastors to thunder out their Ecclesiastical Anathema's, against Persons intitled to the Benefit of the said Toleration; and insolently dares or defies any Power on Earth to reverse such Sentences.

Art. 3. That in his said Sermon at St. Paul's, he did falsely and seditiously suggest and assert, That the Church of England was in a Condition of great Peril and Adversity, under Her Majesty's Administration; and in order to arraign and blacken the Resolution of both Houses, approv'd by Her Majesty, he did in Opposition thereto, suggest the Church to be in Danger; and as a Parallel, mentions a Vote, That the Person of King Charles the First was voted to be out of Danger, at the same Time that his Murderers were conspiring his Death; thereby wickedly and maliciously insinuating, That the Members of both Houses, who pass'd the said Vote, were then conspiring the Ruin of the Church. Art. 3.

Art. 4. That in his said Sermons and Books, he did falsely and maliciously suggest, That Her Majesty's Administration, both in Ecclesiastical and Civil Affairs, tends to the Destruction of the Constitution: And that there are Men of Characters and Fashions, in Church and State, who are False Brethren, and do themselves weaken, undermine and betray, and do encourage, and put it in the Power of others, who are profess'd Enemies, to overturn and destroy the Constitution: And charges Her Majesty, and those in Authority under her, both in Church and State, with a general Male-Administration: And as a publick Incendiary, he perswades Her Majesty's Subjects to keep up a Distinction of Factions and Parties; instils groundless Jealousies, foment destructive Divisions among them, and excites and stirs them up to Arms and Violence: And that his malicious and seditious Suggestions may make the stronger Impressions, he did wickedly wrest and pervert several Passages of Holy Scripture. Art. 4.

777. *The Answer of Dr. Henry Sacheverel, to the
aforesaid Articles.*

The Doctor's
Answer.

He says he admits, that he did preach the said Sermon, at the Affizes held at *Derby*, and the said other Sermon mention'd to be preach'd at *St. Paul's*, and that he caus'd them to be printed; but denies that it was with any malicious or seditious Intent, having been induc'd to print the *Derby* Sermon at the Request of the Grand Jury of that County, and the Sermon at *St. Paul's* at the Request of the Lord Mayor.

Answer to the first Article.

Ans. to the
first Art.

He denies that he hath suggested, That the necessary Means us'd to bring about the Revolution, was odious and unjustifiable; and says, That he was so far from reflecting on his late Majesty, or the Revolution, that he had endeavour'd to clear them from the black and odious Colours, which their greatest Enemies had endeavour'd to cast upon both.

He admits he did suggest, That his late Majesty disclaim'd the least Imputation of Resistance, but says, That he meant such a Resistance as tended to Conquest, which his late Majesty, in his Declaration, did actually disclaim: And he conceiv'd, that such a Suggestion, design'd in Honour of the late King, cou'd not be deem'd any Reflection on him, or be any Crime or Misdemeanor in him: And for his further Justification, he begs leave to recite a Passage in the said Declaration, wherein His Majesty says, *That his Expedition was intended for no other Design, but to have a free Parliament assembled, and that he brought over his Forces to defend himself from the Violence of evil Counsellors*: That the Persons he describes in his Sermon, as casting black and odious Colours on the Revolution, were not those who impute Resistance to the Revolution, (of whom he affirms nothing) but those who affirm and teach, That the People are the Fountain and Original of Power, and may cancel their Allegiance at Pleasure, and call their Sovereign to Account, for High Treason against

against his Subjects, and Dethrone and Murder him for a Criminal, and who urge the Revolution in Defence of such Principles: Unless, therefore, those who impute Resistance to the Revolution, be the same with these new Preachers, and new Politicians, who advance these Antimonarchical Doctrines, he affirms nothing concerning them.

As for his asserting the Illegality of Resistance to the Supreme Power, upon any Pretence whatsoever, he apprehends he has the Authority of the Church of *England* for this Assertion; and that the Church does teach and inculcate this Doctrine, as founded on the Word of God, particularly in the Second Part of the *Sermon of Obedience*, in the former Book of Homilies, set forth in the Time of *Edw. 6.* That this Book of Homilies is affirm'd, in the Thirty-nine Articles, to contain a godly and wholesome Doctrine, and order'd to be read in Churches; and by an Act of Parliament, in the 13th of *Eliz.* it is enacted, That no Person shall be admitted to a Benefice with Cure, except he first subscribe the said Articles: And by an Act of the 5th of *Queen Anne*, it is enacted, That the said Act of the 13th of *Eliz.* shou'd be in full Force for ever, and is declared to be a fundamental and essential Part of the Union of the two Kingdoms.

And the said *Henry Sacheverel* further insists, That the aforesaid Assertion is agreeable to the Common and Statute Law of this Realm; that the *Illegality of Resistance, on any Pretence whatsoever*, has been the Doctrine of the Church of *England*, ever since the Reformation; that it was taught in the University whereof he was a Member; that it had been often, with Approbation of both Houses of Parliament, preach'd and printed, in Terms of greater Force, by the Reverend Fathers of our Church, both dead and living.

That he was the rather induc'd to preach against the Doctrine of Resistance, on the 5th of *November*, because on that Day we commemorate our Deliverance from the traiterous Attempts of Rebellious Papists; and says, that the Doctrine of Resistance was originally a Popish Doctrine; and for that Reason

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son he conceiv'd the Rubrick had appointed one of the six Homilies against Rebellion, to be read on that Day (if there was no Sermon.)

He therefore humbly hopes, that he shall not suffer for asserting the Doctrine of Non-Resistance: But if this Doctrine shou'd be declar'd erroneous, and it pleas'd God he should suffer for asserting it, he trusted God would enable him to shew his steady Belief of this Doctrine, by a meek and patient Resignation to whatever should befall him on that Account.

Answer to the Second Article.

Asw. to the
second Art.

He saith, That he hath not been able to inform himself, that a Toleration hath been granted by Law: He admits, indeed, that an Act did pass, *For exempting Protestant Dissenters from the Penalties of certain Laws: Which Exemption he no where suggested to be unreasonable, or the Allowance of it unwarrantable, and hop'd he had prevented such a Misapprehension, by declaring in his Sermon, That he did not intend to cast the least invidious Reflection upon that Indulgence the Government had condescended to give them, which he was sure all who wish'd well to the Church were ready to grant, to Consciences truly scrupulous: Let them enjoy it in the full Limits the Law has prescrib'd them.* And therefore, if there were any other dubious Expressions in his Sermon, concerning Toleration, he hop'd they wou'd not be applied to the Exemption granted by Law.

779. That he did, indeed, suggest it to be one part of the Character of a *false Brother, Upon all Occasions to defend Toleration, and Liberty of Conscience, and to excuse the Separation, lay the Fault upon the true Sons of the Church, for carrying Matters too high.* And these he did conceive to be justly blamable, and, if Members of the Church, to be *false Brethren*; but he did not design to extend this Reflection to all those who defend the Exemption granted to Protestant Dissenters, but to such only, who at the same Time they defend universal Toleration and Liberty of Conscience, do also excuse the Separation, and lay the Fault thereof upon the true Sons of the Church. As

As to his asserting, That Queen *Elizabeth* was deluded by Archbishop *Grindal*, to the Toleration of the *Genevian* Discipline, he conceives he had good Authority, from History, for that Assertion; but however, such an Assertion was no Proof of his maintaining, *That the Exemption granted to Protestant Dissenters, was unreasonable, or the Allowance of it unwarrantable*; for he thought there was a manifest Difference between a Toleration of the *Genevian* Discipline, and an Exemption of Protestant Dissenters from the Penalties of certain Laws; between a Toleration granted by a Regal Power, and an Exemption by Act of Parliament.

As to his calling Archbishop *Grindal*, *A false Son of the Church, and a perfidious Prelate*; he hoped any harsh Expressions he had us'd towards that Prelate, wou'd be excus'd, and the rather, because he had permitted Innovations to be obtruded on the Church; and thereby incur'd the Displeasure of so pious a Princess as Queen *Elizabeth*, who caus'd him to be suspended till the Day of his Death: However, he presum'd that Words spoken of an Archbishop 120 Years after his Death, wou'd not, in Law, amount to a High Crime and Misdemeanor.

That he had no where maintained, That it was the Duty of Superior Pastors *to thunder out Ecclesiastical Anathema's* against Persons intitled to the Benefit of the Toleration; but if that Expression, by him unapplied to any, must be determin'd to any one sort of Persons, he conceiv'd that the Connexion of his Discourse wou'd determine it, *to those schismatical and factious Persons, who take Permission for Power, and advance Toleration immediately into an Establishment*; and such Persons he apprehended were not the Persons intitled to the Benefit of the Act of Exemption, which was design'd only for scrupulous Consciences. And as for his defying any Power on Earth to reverse such Sentences, he intended only such Sentences as are ratified in Heaven, and such he still affirms to be irreversible by any earthly Power, and hopes it wou'd not be insolent in him to affirm, what it

would be Blasphemy in any one to deny; and he acknowledges, he does believe that some Sentences pronounc'd by the Pastors of the Church, are ratified in Heaven; and that some Persons exempted from Punishment, by the Laws of the Land, may yet, by the Laws of Christ, be justly liable to such Sentence: And that a causeless Separation from the Church exposes the Persons guilty of it to the Censures of the Church.

Answer to the Third Article.

Answ. to the
third Art

As to his asserting, That the Church was in great Peril and Adversity, &c. he denies that he suggested it was so under Her Majesty's Administration: He acknowledges, indeed, that he did, in his Sermon, suggest Danger arising to the Church and Kingdom, from Vice and Infidelity; and this, he presum'd, was not opposite to the Vote of both Houses, or tending to Sedition, it having been declared, by an Act of the 10th William III. for the suppressing Blasphemy and Prophaneness, *That many blasphemous and impious Opinions, contrary to the Doctrines and Principles of the Christian Religion, had of late been publish'd, which might prove destructive to the Peace and Welfare of the Kingdom:* And he conceiv'd, that since the passing of that Act, the detestable Crimes it prohibited were greatly increas'd: And he apprehends those Suggestions he made, of Dangers arising to the Church, from Vice and Infidelity, were not more contrary to the Vote of the two Houses, than that Prayer of the Church, frequently us'd before the Houses of Parliament, *That he would give us Grace seriously to lay to Heart the great Dangers we are in, by our unhappy Divisions, &c.*

And he saith he hath not drawn any Parallel (as he is charg'd) between the Vote concerning King Charles's being out of Danger, and the late Vote of the two Houses, for he no where mentions this Vote of the two Houses in his Sermon, but had he asserted one Vote to be parallel to the other, he would not hereby have wickedly and maliciously insinuated, That the Members of both Houses, who pass'd the late Vote, were then conspiring the Ruin

of

of the Church, but had only intimated, That as some Persons were conspiring the Murder of the King, whilst others, no way privy to their Intentions, Voted his Person out of Danger; so when the two Houses Voted, the Church to be in no Danger under Her Majesty's Administration, there might be others who were conspiring the Ruin of the Church.

And further, That the Vote of the two Houses four Years ago, cou'd only affect those who then insinuated, the Church was in Danger under Her Majesty's Administration, but cou'd not be extended to those, who now suggested the Christian Faith to be endanger'd by those atheistical and irreligious Principles, as were daily, from the Press, propagated amongst us, and notwithstanding the Act against Blasphemy and Profaneness, he thought he might still, with Truth affirm, as he did in his Sermon at *Derby*, *That there never were such outrageous Blasphemies against God, and all Religion, natural as well as reveal'd, vented publickly with Impunity, in any Christian Church or Kingdom in the whole World, as at present in our own.* Of which Assertion he was ready to produce ample Proofs, if requir'd.

Answer to the Fourth Article.

He says, he observes with Comfort, that he is *Answ. to the* not in this, as in the former Articles, accus'd of fourth Art. maintaining or asserting any Thing, but with bare Suggestions, or Insinuations, which he hop'd, by their Lordships, who were the great Guardians of our Laws and Liberties, wou'd be adjudg'd insufficient to involve an *English* Subject in the Guilt and Punishment of High Crimes and Misdemeanors.

But he says he is so far from suggesting, That Her Majesty's Administration, in Ecclesiastical or Civil Affairs, tends to the Destruction of the Constitution, that among the rest of the inestimable Blessings owing to our Deliverance, commemorated on the 5th of *November*, he reckons this to be one, That Her Majesty, the pious Relict of the Royal Family, now sits upon the Throne of Her Ancestors; and professes, that what he spoke, proceeded from a tender Concern for Her Majesty's Person and Government.

That as to his suggesting, there were *Men of Characters and Stations* in the Church, who were *false Brethren*, he says, the false Brethren described by him, are *either those who propagate false Doctrines, or who give up the Discipline and Worship of the Church, or who are for a Neutrality in Religion, or who wish well to the Church of England, and are ready to sacrifice their Persons and Estates, in her Vindication, but do not*
 781. *show their Zeal in the Communion of the Church, as well as far it, in obeying her Precepts.* And, if he had suggested, That there were *Men of Characters and Stations*, in Church and State, to whom some of these Descriptions of a false Brother did belong, (tho' his Words cou'd by no means be restrained to Men of the highest Characters and Stations) he hop'd such a Suggestion wou'd not be deem'd highly criminal.

And where he speaks of *those who weaken, undermine, and betray, and encourage, and put it in the Power, of our profess'd Enemies, to overturn and destroy the Constitution*; there *Men of Characters and Stations*, are not mention'd by him: And where he mentions *Men of Characters and Stations*, twelve Pages after, there is nothing of *weakening, undermining, &c.* and he hopes he shall not be answerable for a suppos'd Reflection, which depends upon the Conjunction of Passages so widely distant, and so little relating to each other; and that upon a candid Examination of those Passages, the Weakners, Underminers, and Betrayers of our Constitution, to whom this Sermon refers, will appear to be, either, First, *Such as endeavour to subvert the Foundations of our Church and State*: Or, Secondly, *Such who are for a Latitudinarian Heterogeneous Mixture of all Persons, of what different Faith soever, uniting only in Protestancy, and who wou'd let into her Bowels, those who neither believe her Faith, own her Mission, or comply with her Liturgy*: Or, Thirdly, *Those occasional Conformists, who have so far eluded the Corporation and Test Acts, by their Hypocrisy, that they have endanger'd the Govern-*
 ment,

ment, by filling it (as far as they cou'd) with its profess'd Enemies; that is, with themselves. These, and their Encouragers, he confesses himself to have suggested, That they do, in his Opinion, weaken, undermine, and betray the Constitution; but he has no where suggested, That any such were Men of Characters and Stations, in Church or State.

And he is so far from charging Her Majesty, or those in Authority under her, with Male-Administration, as this Article charges, that he abhors the Thoughts of it, and has never mention'd Her Sacred Majesty, but in Terms of the profoundest Duty and Respect; and among the Writings he has publish'd, one of them was an avow'd Defence of her Title to the Crown, and a Justification of her entering into a War with *France* and *Spain*; and he has therein express'd himself with the most hearty and loyal Zeal for Her Majesty's Person, Government and Administration.

And whereas this Article charges him as a publick Incendiary, and endeavouring to keep up a Distinction of Factions and Parties, he is so far from it, that in his Sermon he invites the Separatists to renounce their Schism, and come sincerely into the Church; and complains of those who have villainously divided us, with the knavish Distinction of *High* and *Low* Churchmen; and that he is so far from instilling groundless Jealousies and Fears into the People, that he rebukes and condemns those, who by raising groundless Jealousies and Fears, embroil the Publick, and bring it into Confusion; and instead of inciting the People to take up Arms, as this Article charges, he has asserted, *The utter Illegality of resisting the supream Power, upon any Pretence whatsoever*: Which Assertion he conceives to be the chief, if not the only Ground of the Charge exhibited against him in the first Article.

And he hopes, that Expression in the Dedication of the *Derby* Sermon, *That there are not wanting some to preach the Truth, and others to support it, at the Expence of their Lives and Fortunes*; will

will not be construed, as exciting the People to Sedition and Rebellion, since the *Truth* he commends some for *preaching*, and others for *supporting*, is oppos'd to the Attempts of those who betray and run down the Principles and Interests of our Church and Constitution; and since he there commends the High Sheriff for his Loyalty and Zeal to serve Her Majesty, for which he had been so remarkably distinguish'd.

That he did, indeed, in his Sermon at St. Paul's, excite Christians to *put on the whole Armour of God, &c.* but he had learnt from St. Paul, that the Arms of Resistance taken up by Subjects, against the Higher Powers, were no part of that Spiritual Armour, and that the *Principalities and Powers* mentioned by him, were so plainly distinguish'd from Flesh and Blood, that they cou'd not be so far misinterpreted, as to be understood of earthly Potentates: And he saith, That having no malicious or seditious Suggestions to impress on the Peoples Minds, he cou'd not intend to wrest any Passages of Scripture to that wicked Purpose.

And hard, he said, was the Lot of the Ministers of the Gospel, if when they cited the Word of God, in their general Exhortations to Piety and Virtue, &c. the Passages cited by them shou'd be said to have been meant of particular Persons and Things, and shou'd be construed in the most criminal Sense, and be made, by such Construction, one Ground of an Impeachment for High Crimes and Misdemeanors.

And as to all other Matters contain'd in the said Articles, he saith he is Not Guilty, &c.

The Replication of the Commons was read.

The Replication of the Commons.

They observe, There are many Things in the Doctor's Answer, reflecting on the Honour of the House of Commons, for which they might demand their Lordship's immediate Justice; but desiring to avoid all Occasions of Delay, *they say, they do averr their Charge against the said Henry Sacheverel to be true*, and shall be ready to prove it, at such convenient Time as shall be appointed for that Purpose.

Then

Then the Lord Chancellor acquainted the Managers, they might proceed with their Evidence.

Whereupon, Mr. Attorney General (Sir *James* Mr. Att. Gen. *Montague*) proceeded to open the Charge: He opens the said, That the Commons having consider'd how Charge. much it concern'd the very being of the Constitution, to discountenance such seditious Proceedings, as the Dr. and some others of his Brethren, had been lately practising in divers Parts of the Kingdom, they look'd upon it as a Matter fit for the Grand Inquest of the Nation to take notice of, and to be taken under their own Management, and not trusted to the Decision of any Tribunal, inferior to that of their Lordships, who were the only proper Judges, when the Commons found it necessary to be Prosecutors. 783.

Nor could Dr. *Sacheverel* justly complain of this Manner of proceeding, which gave him so publick an Opportunity of defending himself (if he was innocent;) especially having been allow'd all the Advantages a Man under his Circumstances cou'd ask. He said, This Prosecution took its Rise from a Complaint made in the House of Commons, the 13th of *December*, of two Books publish'd by the Dr. containing scandalous and seditious Matter, highly reflecting on the Queen, and her Administration: That the Dr. having been order'd to attend the House, had own'd and avow'd both the Books to be his; that they were Sermons preach'd and publish'd by him; and that thereupon the Commons did express their Resentment, at the Injuries done to Her Majesty, and those in Authority under her, and immediately order'd this Impeachment.

That the Drift of these Sermons, and the Dedications, was to possess the People with terrible Apprehensions of the Danger they were in, by a general Male-Administration.

In the Dedication to his *Derby* Sermon, he affirm'd, That the Church and Constitution were shamefully betray'd, and run down: And in the Sermon preach'd at *St. Paul's*, on the 5th of *November*, a Day set apart to commemorate two such signal

signal Deliverances, as the Discovery of the Powder Plot, and the Arrival of King *William*, he pass'd by both these, and entertain'd his Audience with a long Harangue of the deplorable Condition the Church was in, not from Papists, but her pretended Friends, false Sons of the Church, who were crept into her Bowels, and shewn themselves to be perfidious Brethren, by defending Toleration, and Liberty of Conscience, and favouring the Dissenters.

And to shew his Dislike of the Revolution, he had asserted, *That it was not lawful, on any Pretence whatsoever, to resist the Supreme Power: Which Supreme Power, in other Passages he explain'd to be the Regal Power.*

And justly apprehending he shou'd be understood to censure the Means that brought about the Revolution (and intending to cast as heavy Reflections as he cou'd on the Memory of King *William*) he asserts, *That the Prince of Orange disclaim'd all manner of Resistance; tho' he knew the Prince came over with an armed Force, and by his Declaration invited and required People of all Degrees to assist him in executing the Design he undertook, against all that shou'd oppose him; but that the Doctor's true Meaning was, to make the Prince of Orange say one Thing, and do another, and thereby asperse his Memory.*

784: He observ'd also, That this Discourse of Non-Resistance, at this Time, was wholly needless, and therefore cou'd have no other Tendency, than to censure that Resistance which brought about the Revolution; for when he preach'd the Sermon, there were no Symptoms of Discontent throughout the Nation; no History cou'd ever give a better Account of the good Dispositions of the People to their Sovereign.

And if all were false Sons of the Church, who assisted in the Revolution, he said the Dr. wou'd do well to consider how far this Character might be carry'd; for the Body of the Clergy of the Church of *England* were not unconcern'd; they made a noble Stand against the Encroachments that were then making;

making: It was by them the Nobility and Gentry were animated to defend their Rights; and the whole Kingdom had such a Sense of it, that it is entred in the Journal of the House of Commons, the 1st of February, 1688, *That the unanimous Thanks of the House was given to the Clergy, for the great Services they had done their Religion and Country, by the Opposition they had made to the Execution of the Ecclesiastical Commission, and their refusing to read the King's Declaration for a Toleration, which was then founded on the dispensing Power.*

The Thanks of the Commons to the Clergy, for the Services they performed, in bringing about the Revolution.

And when Mr. Levison Gower attended the two Archbishops with the Thanks of the House, Archbishop *Saucroft*, and the then Archbishop of *Tork*, return'd their Thanks to the Commons, for themselves, and in Behalf of all their Clergy, for their favourable Vote.

He observ'd, That the Commons were then happy enough to be thought favourable to the Clergy, tho' it was that very House of Commons that pass'd the Toleration Act; and they were encourag'd in so charitable a Work, by the seven Bishops, who acquainted King *James*, in their Petition, *That it was not for want of a due Tendernefs to Dissenters, which made them refuse reading his Declaration for Toleration to Dissenters, in relation to whom, they were willing to come to such a Temper as shou'd be thought fit, when the same came to be considered in Parliament.* And now this had been consider'd and settl'd in Parliament, the Dr. was pleas'd to tell us, *He must be weak, or something worse, who pretends that the Dissenters are to be gain'd by any other Grants and Indulgencies, than giving up our whole Constitution, and he that recedes one Tittle, to satisfy those Church-devouring Malignants, knows not what Spirit they are of.* And after such an ample Declaration of his Opinion, the Dr. must not think to salve all, by saying, *He did not intend to cast the least invidious Reflection upon the Indulgence the Government had condescended to give them.* And if an Archbishop, who had been dead 120 Years, cou'd

could not be permitted to rest in his Grave, but must be aspers'd as a *false Son, and a perfidious Prelate of the Church*, for interceding with Queen Elizabeth for Dissenters, what must the present Archbishops and Bishops expect, if they did not thunder out their Anathemas against Dissenters, as often as the Dr. thought there was Occasion for them?

And notwithstanding that Distinction the Dr. found it convenient to make upon this Occasion, between a Toleration, and the Indulgence granted Dissenters by Law, he cou'd not say that the Word *Toleration* had not been us'd to signify that Indulgence, he himself having frequently us'd it in that Sense in his Sermon; and he might be put in mind, that Her Majesty, in her Speech of the 17th of December, 1705. did declare, That she wou'd inviolably maintain the *Toleration*. And he said the Place was as improper as the Time, for preaching such Doctrines; it was in the great Metropolis, and before those Citizens who ow'd the Restoration of their Charters, and all their Franchises and Immunities, to the Revolution; from whose steady Loyalty and firm Affections to the Revolution, such vast Sums had been contributed, for carrying on the War against *France*; and nothing cou'd give a more fatal Wound to the publick Credit, than the advancing such Doctrines among them, at this Time, as tended to overthrow all the Acts of Parliament, which had been made in Support of this Constitution.

785. The Dr. indeed denied, in his Answer, that he had said any thing of the Means that brought about the Revolution, *but endeavour'd to vindicate it from the odious Colours cast upon it*; but then to what Purpose were these Doctrines preach'd with such Vehemence at this Time? Did not almost every one strive to shew his Zeal and Affection for Her Majesty? If there were any less quiet than their Neighbours, they were to be found amongst the Friends of Dr. *Sacheverel*; and nothing was more certain, than that *those who were not satisfied with what was done at the Revolution, must be Enemies to the*

the present Establishment. And 'twas from this Source that all these Declamations against Men of Characters and Stations, in Church and State, proceeded; but the Dr. wou'd have done well to have consider'd, we have Laws to punish the Spreaders of false News and horrible Stories of the great Officers of the Kingdom; and 'twas to put a Stop to these malicious Practices, that this Delinquent was brought to the Bar; and when they shou'd have read their Proofs, they did not doubt their Lordship's Judgment against the Defendant.

Mr. *Lechmere* being also appointed to assist in Mr. *Lechmere's* stating the Grounds of the Charge against the Dr. Argument on said, That the Prisoner had asserted a Doctrine, in opening the direct Defiance and Contradiction to that Resi. Charge. stance us'd to bring about the Revolution, when he affirm'd *the utter Illegality of Resistance, on any Pretence whatsoever, to be a Fundamental of our Constitution.* And when a Preacher, under this happy Establishment, shou'd thus publicly condemn the Foundations on which it stands, it became their indispensable Duty, who appear'd in the Name, and on the Behalf of all the Commons of *Great Britain*, not only to demand their Lordship's Justice on such a Criminal, but clearly and openly to assert our Foundations. 786;

He observ'd, That the Case between the late King *James*, and the Subjects of both Kingdoms, was stated in the Declarations of the Rights of both Nations, made by them at the Revolution.

That in the Preamble to the Bill of Rights pass'd in *England*, it is said, *That by the Assistance of evil Counsellors, Judges, and Ministers, he did endeavour to subvert and extirpate the Protestant Religion, the Laws and Liberties of the Kingdom, &c.* In the Bill pass'd in *Scotland*, it is declared, *That by the Advice of Evil Counsellors, he did invade the fundamental Constitution of that Kingdom, and alter'd it from a legal limited Monarchy, to an arbitrary despotick Power:* And if their Lordships wou'd again on this Occasion consider the ancient legal Constitution of the Government of this Kingdom, it wou'd evidently appear,

pear, That the Subjects of this Realm had not only a Power and Right in themselves to make that Resistance, but lay under an indispensable Obligation to do it, for that our Constitution is a limited Monarchy, wherein the Supreme Power is divided between Queen, Lords, and Commons; the Terms whereof do not only suppose, but express an *Original Contract*, between the Crown and the People; by which the Supreme Power was (by mutual Consent, and not by Accident) lodg'd in more Hands than one, and consequently, the Laws were to be the Rule and Measure of the Power of the Crown, as well as of the Obedience of the Subject: And if the Executive Part endeavours the Subversion and Destruction of the Government, the original Contract was thereby broke, and the Right of Allegiance ceased: That part of the Government, thus fundamentally injured, had a Right to save or recover that Constitution in which it had an original Interest. He said, the History of *Magna Charta* alone, sufficiently shew'd the Sense of our Ancestors, that they were Masters of Franchises truly their own, which no earthly Power had Right to extort from them; and many other valuable Relicks had our Popish Ancestors left us, as Proofs of the Freedom of our Constitution, and of the constant Claims they made, both in and out of Parliament, to their Inheritance in the Laws, against the Encroachments of Arbitrary Power; and when they were call'd to it by Extremity, they never fail'd to vindicate them by the Arms of Resistance.

Such, he said, was the Genius of a People, *not bound by Laws, to which they did not consent*, that muffled up in Darkness and Superstition as our Ancestors were, yet that Notion seem'd to have made such strong Impressions on their Minds, that nothing cou'd impair it.

And upon the Reformation, when all foreign Power was abolish'd, and the Supremacy of the Crown restor'd to its Height by many Acts of Parliament, Declarations were at the same Time made, of the Rights of the People, particularly in the

25. H. 8. And these, he said, were fresh Declarations and Ratifications of the *Original Contract*.

That this excellent Constitution had thro' many Struggles been preserv'd, and the true Spirit of the *English Nation* kept alive, down to the Times of the late happy Revolution, when the Danger being imminent, not only to the Laws and Liberties of the Kingdom, but to the Protestant Religion, *the ancient Virtue of the English Nation exerted itself, and shone out in its full Lustre in that glorious Work.*

That the many Laws pass'd since, relating to the Succession, &c. were a Confirmation of this ancient Constitution; and the many glorious Successes of Her Majesty's Arms, employ'd in the Defence of the Arms of Resistance, were so many Testimonies from Heaven in their Vindication. 787.

As to those general Exhortations to Obedience, in the Homilies, he said they cou'd be only understood of ordinary Cases, and not extended to such a Time, when the Case supposes, that the Force of all Law was ceased.

That the Dr. had aggravated his Crime in his Answer, by asserting so pernicious a Tenet, as that of *absolute Non-Resistance*, to be a fundamental part of our Government, and consonant to the Doctrine of the Church of *England*.

It was a Dishonour to the Crown, whose Glory 'twas to govern a Nation of Free-born Subjects, the meanest of which had an Inheritance in the Government and the Laws, equal with the greatest: And it was a Reflection on the Church of *England*, to charge it with such Doctrines as wou'd authorize all Irreligion and Oppression.

And in Gratitude to their *Great Deliverer*, he said, The Commons wou'd ever assert, the Honour and Justice of that Resistance, by which an oppressed People were rescued from inevitable Destruction, and that happy Revolution was effected; and they did not doubt, but their Lordships wou'd, in a Parliamentary Way, *fix a Brand of indelible Infamy* on that enslaving Tenet, by which it was condemn'd.

As to the *Toleration*, (one of the earliest and happiest Effects of the Revolution) the Commons, with the highest Gratitude, remembred Her Majesty's Resolution declar'd from the Throne, to preserve it inviolably, and yet their Lordships might observe many plain Declarations of the Prisoner's against this Toleration; and his arrainging the Memory of a late Prelate, for his compassionate Intercessions with Queen *Elizabeth*, in Favour of dissenting Protestants, was plainly meant to cast an Odium on the Act of Toleration, and on the present Fathers of the Church, so eminent for their Charity and Moderation; and that by the Applauses he bestow'd on the Severities us'd by Queen *Elizabeth*, illustrated the Calumny thrown by him on Her present Majesty, in her Approbation of the Toleration.

And notwithstanding all Ecclesiastical Jurisdiction was, by the Laws of this Kingdom, made subject to the Civil Power, the Prisoner had endeavour'd to persuade the superior Pastors of the Church, to thunder out their Anathema's against Dissenters, and insolently *defied any Earthly Powers to reverse such Sentences*: And the Commons conceiv'd, That the Independent Power or Jurisdiction of the Church, which was the Doctrine advanc'd by the Prisoner, was destructive of the Legal Supremacy of the Crown and Legislature, a Violation of the Oath of Supremacy, and contrary to the Principles of the Reformation.

788. That as to the *Danger of the Church*, it was a groundless Slander, reviv'd and avow'd by the Prisoner, from an inveterate Pride, to signalize his Enmity to Her Majesty, and both Houses, and in the most publick Manner to insult the Honour of the Queen and Legislature, at the same time he was endeavouring to subvert their Foundations.

And it was no Wonder, he said, that the Prisoner, who had set himself to weaken Her Majesty's Title to the Throne, shou'd asperse her *Administration*; their Lordships wou'd find him labouring to persuade the People, that the Condition of Peace and Prosperity, which the good Government
of

of Her Majesty had secur'd to her Kingdom, was a State of Distraction and Confusion, wherein all Irreligion and Disorder was not only unpunish'd, but *encourag'd*. And from this ruinous Posture of Affairs, their Lordships wou'd find the Dr. considering himself as a peculiar Messenger appointed and call'd out to open the Eyes of a deluded People, and undeceive a Nation thus abus'd; and this he had done, not in the Words of Meekness, or by exhorting them to the Exercise of the submissive Doctrines of *Passive Obedience and Non-Resistance*; but he endeavour'd to excite such true Sons of the Church, as were of his Persuasion, to recover, defend, and maintain, with their Lives and Fortunes, their invaded Rights, and such Doctrines as he thought fit to deliver to them.

And he further observ'd, That the Principles advanc'd by the Dr. tended to persuade the World, *That the glorious Work of the Revolution was the Fruit of Rebellion, and the Work of Traitors; that the late Reign was a continued Usurpation, and the present no better.*

Indeed, he said, it seem'd strange, at first, that absolute Non-Resistance, and the Spirit of Rebellion shou'd stand so well together, and be made so suitable in the same Discourse; but if their Lordships shou'd discern in his Sermon any dark Hints of a *sole Hereditary Right of Succession* to the Crown, that wou'd shew the Consistency of the whole, and it wou'd be found to be the Doctor's Opinion, That the Duty of absolute Non-Resistance was owing to him only that had the *Divine Commission* to Govern, and from hence it wou'd appear, against What Queen, What Government, and What Establishment, he encourag'd the taking up the Arms of Resistance.

Then Mr. *Jodrel* was sworn, and depos'd, That the Dr. acknowledg'd both the Sermons, and the Dedications, to be his, before the House of Commons; which was likewise admitted by the Doctor's Council.

Then the Dedication to the *Derby* Sermon was read; and the Dedication of the Sermon preach'd

at St. Paul's, with the Sermon it self, was read; (but the Passages in them suppos'd to be criminal, occurring often hereafter, in the Trial, it seems unnecessary to insert them here.)

801. Second Day. *Tuesday* the 28th of *February*.

The Court being fate, and the Lord Chancellor intimated to the Commons that they might proceed; whereupon

Sir *Jos Fekyl's* Sir *Joseph Fekyl*, in Maintenance of the first Argument in ticle said, That the Commons cou'd not but think Maintenance it hard, after more than twenty Years Enjoyment of the Benefits arising by the Revolution, they shou'd be forc'd to plead in Vindication of it. But

since they must either give up their Right to the Laws and Liberties of the Kingdom, or, which was all one, be precarious in the Enjoyment of them, and hold them only during Pleasure, if this Doctrine of unlimited Non-Resistance prevail'd, the Commons were content to undertake this Prosecution; and they who shar'd in the Legislature with their Lordships, had put themselves into the Condition of Suitors against this Offender. He said, upon the present Question depended their present Happiness and future Hopes: That this Principle of unlimited Non-Resistance had been receiv'd by the profess'd Friends of the Pretender, and prosecuted with unusual Warmth, since his Attempt upon Her Majesty's Crown; nor cou'd he have any Hopes, but from the keeping alive such Notions: Whereas the Queen's Title cou'd receive no Advantage from them.

821. That it was far from the Intention of the Commons, to state the Bounds of the Subjects Submission to the Sovereign; what the Law was wisely silent in, the Commons desir'd to be silent in too; nor shou'd they put any Case of a justifiable Resistance, but that of the Revolution only; and to make out the Justice of that, it might be laid

The Laws the Measure of the Subjects Obedience. *That as the Law is the only Measure of the Prince's Authority, and the Peoples Subjection, so that Law derives its Being and Efficacy from common Consent:* But instead of this solid and rational

tional Foundation, of late the Patriarchal and other fantastical Schemes, had been framed to rest the Authority of the Law upon; and so Questions of Divinity had been blended with Questions of Law; when it was plain, that Religion had nothing to do to extend the Authority of the Prince, or the Submission of the Subject, but only to secure the legal Authority of the one, and enforce the due Submission of the other, from the Consideration of higher Rewards, and heavier Punishments.

That as the Doctrine of Unlimited Non-Resistance was implicitly renounc'd by the whole Nation, in the Revolution, so they had since express'd that Renunciation by several Acts, particularly in that of the 1 W. and M. *for abrogating the Oaths of Supremacy and Allegiance, and appointing other Oaths*, whereby the Declaration enjoin'd to be taken by several Acts, in the Reign of Car. 2. viz. *That it is not lawful, upon any Pretence whatsoever, to take up Arms against the King*, was taken away: And in another Act of 1 W. and M. *declaring the Rights and Liberties of the Subject*, after a Recital that the late King James had endeavour'd to subvert and extirpate the Protestant Religion, and the Laws and Liberties of the Kingdom, &c. It is declared, *he had abdicated the Government, and the Throne was thereby become vacant, and it had pleas'd God to make the Prince of Orange the glorious Instrument of delivering the Kingdom from Popery and Arbitrary Power*; And he said, If the Instrument who brought about that Deliverance was fill'd Glorious, the Means us'd by him is consequently approv'd and applauded: That the Act *for paying the States General 600000 l. for the Charges of those Forces he brought along with him*, also shew'd their Approbation of the Means us'd by that Prince. And by another Act of the second Sessions of the same Parliament, entitl'd, *An Act for preventing vexatious Suits against such as acted in order to the bringing in Their Majesties, or for their Service*, the Act says, *That tho' such Proceedings, in Times of common*

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Safety, wou'd not have been warrantable; yet they were *then necessary*, in regard of the Exigency of publick Affairs, and *ought to be justified*; and accordingly provided an Indemnity for those who acted in that Resistance. And in the Prayers appointed to be us'd on the 5th of *November*, we thank God for giving his late Majesty a safe Arrival here, *and making all Opposition fall before him, till he became our King and Governor*: And yet, notwithstanding all this, Dr. *Sacheverel* had condemn'd the Resistance by which that Deliverance was wrought. And tho' he pretended the late King and Parliament disclaim'd all Resistance, at the Revolution, he had cited two Passages in the Prince of *Orange's* Declaration, which shew'd that his late Majesty was so far from disclaiming Resistance, that he avow'd it, and invited the Subjects of this Kingdom to join in that Resistance. And as to what he said in relation to the Parliament's disowning any Resistance at the Revolution, by asserting, they set the Crown upon the King's Head, on noother Title than that of the Vacancy of the Throne, that appear'd to be directly otherwise, not only from the Acts of Parliament before cited, but from the Conferences between the two Houses, previous to the settling of the Crown upon the King's Head, when the Word *Abdicated* was insisted upon and carried; for that it included in it the Male-Administration of King *James*, which the Word *Deserted*, (contended for by some) did not.

That the Dr. therefore, knowing there was Resistance us'd at the Revolution, and that the late King and Parliament had avow'd that Resistance, and yet asserting, that they who say there was any
 804. Resistance in it, cast black and odious Colours on the late King and the Revolution; consequently he condemn'd the Resistance us'd to bring about the Revolution; which was the Matter of the first Article.

Mr. Sol. shews
 the several
 Passages in-
 sisted on for
 Proof of the
 first Article.

Mr. Solicitor said, it fell to his Share to state the several Passages in the Sermon preach'd at *St. Paul's*, which the Commons rely'd upon as a Proof of the first Article, and to shew the Weakness and Insufficiency

iciency of the Doctor's Answer to this Charge: And, *First*, he shew'd, That in the 11th and 12th Pages of this Sermon, the Dr. having asserted, *That the grand Security of our Government, and the very Pillar on which it stands, is founded upon the steady Belief of the Subjects Obligation to an absolute and unconditional Obedience to the supreme Power, in all Things lawful, and the utter Illegality of Resistance, on any Pretence whatsoever*; Which he said had been lately exploded and ridicul'd, goes on in these Words.

Our Adversaries think they effectually stop our Mouths, and have us sure and unanswerable upon this Point, when they urge the Revolution of this Day in their Defence; but certainly they are the greatest Enemies of that and his late Majesty, and the most ungrateful for the Deliverance, who endeavour to cast such black and odious Colours upon both. How often must they be told, that the King himself solemnly disclaim'd the least Imputation of Resistance, in his Declaration? And that the Parliament declar'd they set the Crown on his Head, upon no other Title than that of the Vacancy of the Throne? And did they not unanimously condemn to the Flames that infamous Libel that wou'd have pleaded the Title of Conquest, by which Resistance was suppos'd.

Now the Doctor's Argument, he observ'd, run thus: All Resistance is utterly illegal; the King disclaim'd the least Imputation of Resistance; the Parliament set the Crown upon his Head upon no other Title than that of the Vacancy of the Throne; and burnt a Book because it asserted a Title by which Resistance was suppos'd; and therefore to impute Resistance to the Revolution, is to cast *black and odious Colours* upon his late Majesty and the Revolution: This, he said, fully made out the Charge of his asserting and maintaining, *That to impute Resistance to the Revolution, is to cast black and odious Colours upon his late Majesty and the said Revolution.*

In his Answer, indeed, he denied he maintain'd, *That the necessary Means us'd to bring about the*

805. Revolution, were odious and unjustifiable; or his affirming any thing concerning the *necessary Means*, and 'twas very true the Words *necessary Means*, were not used in any part of his Sermon; nor was it necessary to charge the Assertion in the very Words, but if *Resistance* was *necessary*, and the *Means* by which the Revolution was effected, then had he asserted the Means to be odious and unjustifiable, tho' he had done it in other Terms. As to his maintaining, That his late Majesty disclaim'd the Imputation of Resistance, this the Dr. admitted; but says, he meant only, that the King disclaim'd a Resistance that tended to Conquest.

Now this, he said, must be a meer Shift and Evasion; for the Question is stated upon Resistance in general, Whether Resistance, in any Case, or upon any Occasion, was lawful? And indeed, if the Lawfulness of Resistance in any Case, be allow'd, 'tis impossible that his general Assertion shou'd stand; and the Dr. was so aware of this, that he denied there was any Resistance at all at the Revolution, and says, that the least Imputation of it was solemnly disclaim'd and disavow'd: Nor wou'd it have been any Answer to the Objection, if he had said in expresse Terms, that the King disclaim'd all Resistance that tended to Conquest, for if there was any Resistance (tho' not the particular Resistance the King disclaim'd, and that Resistance be agreed to be lawful) his fundamental Doctrine is shaken.

And as he wou'd excuse himself, by saying, he design'd this as a Vindication, and not as a Reflection, on His Majesty, and if he were mistaken in his Assertion, it ought not therefore to be charg'd on him as a high Crime and Misdemeanor: 'Twas true, had he really design'd these Words in Honour of his late Majesty, the Commons had never charg'd them on him as a Crime; but they cou'd never be meant in Vindication of His Majesty from the Imputation of a Design of Conquest, for there was no Occasion to vindicate him upon that Point, nor did his Discourse lead to it: The Question was not, Whether the Revolution was brought about by Con-

Conquest; and therefore there cou'd be no Colour for saying that he meant by that general Expression, that the King disclaimed a Resistance which tended to Conquest only.

That it was therefore an apparent Scandal upon the Memory of his late Majesty, who was so far from disclaiming all Resistance, that he declares he brought over a sufficient Force to defend himself against Evil Counsellors, &c. and encourages the People to join with him.

As to what the Dr. had insisted on in his Answer, That he conceiv'd he had the Authority of the Church of *England* to justify his Assertion of the utter Illegality of Resistance to the supreme Power, upon any Pretence whatsoever, and that it was agreeable to, and warranted by the Statute and Common Law of this Kingdom.

He said, it must be agreed, there was no Colour to charge the Dr. with maintaining, That the Resistance us'd at the Revolution was odious and unjustifiable, if that Doctrine, of the utter Illegality of Resistance, upon any Pretence whatsoever, was true, for then the Censure was just, and the Resistance us'd at the Revolution was not to be maintain'd.

But the Commons shou'd think themselves ungrateful for that Deliverance, if they did not vindicate the Honour of the late King, and of those illustrious Persons; who, upon his Invitation, defended the Constitution at that Time by *Resistance*, and declare that this Resistance was lawful and honourable. 807.

That the Commons must ever resent with Detestation, a Position that shakes the Authority of that Act of Parliament whereby the Crown is settled upon Her Majesty; for if the Resistance at the Revolution was illegal, and the Revolution is settled in Usurpation, this Act has no greater Force, than an Act pass'd under a Usurper; and this shew'd of what Importance it was to the present and future Happiness of this Kingdom, to clear his late Majesty and the Revolution, from those black and odious Colours the Dr. has cast on both.

And

And as to this Assertion of his being agreeable to Law, it was not only in direct Contradiction to several Acts of Parliament, as had been observ'd, but besides it cou'd never be suppos'd, that the Laws were made to set up a despotick Power to destroy themselves, and to warrant the Subversion of a Constitution, which they were design'd to Establish.

And it appear'd in the Act *declaring the Rights and Liberties of the Subject*, That at the Time of the Revolution, there was a total Subversion of the Constitution of Government, both in Church and State; which was a Case that the Laws of *England* cou'd never suppose, provide for, or have in view; and the same Answer, he conceiv'd, might with equal Reason, be applied to the general Doctrine of the Church, express'd in her Homilies.

Sir *John Holland* being also appointed to assist in maintaining the first Article, he said, That there was a Resistance at the Revolution, was most plain, if taking up Arms in *Yorkshire, Nottinghamshire*, and almost all the Counties of *England*, if the Desertion of King *James's* own Troops to an invading Prince, and turning their Arms against their

808. Sovereign, were Resistance; but if Subjects were oblig'd to an absolute unconditional Obedience, then the Convention of the States, the Settlement and Entail of the Crown by them, and the further Settlement in the Protestant Succession under that Settlement, must from that Resistance be unlawful and void.

That the Commons wou'd not be understood to plead for a *Licentious* Resistance: They knew they were oblig'd by all the Ties of social Creatures and Christians, for Wrath and Conscience sake, to submit to their Sovereign: They did not abet humour-some factious Arms; they averr them to be rebellious: But yet they wou'd maintain, that that Resistance at the Revolution, which was so *necessary*, was lawful and just from that *Necessity*.

They did agree, that the Laws concerning Obedience were very express and positive, and the Homilies and Fathers, dead and living, also express our Duty

Duty in general Terms, but it did not follow, that there was no Exception to these general Rules in Conscience.

That the Law which enjoins the Observation of the Sabbath, commands us *to do no manner of Work*, and yet *Necessity* makes an allow'd Exception to that general Law; and the Reason why *Necessity* is allow'd as a just Exception, is given by our divine Lawgiver, *viz. That the Sabbath was made for Man, and not Man for the Sabbath.* And in this Case, whether Government was made for Man, or Man for Government, would easily appear from this short Observation: Man was made in a State of Perfection; and the Restitude of that State, supposes the Absence of all those Crimes, which are the Objects of Government, and which Government is to reform: And therefore Government cou'd not be one End of Man's Creation; and these general Rules of Obedience might upon a real *Necessity*, admit a lawful Exception: And such a necessary Exception they asserted the Revolution to be. That it was with this View of *Necessity*, only absolute *Necessity* of preserving their Laws, Liberties, and Religion; and 'twas with this Limitation they desir'd to be understood, when any of them spoke of Resistance in general.

And he observ'd, That the Clergy, at the Time of the Revolution, were so far from averring the Unlawfulness of Resistance, upon any Pretence whatsoever, that the true distinguishing Characteristick of a Church of *England* Man then was, wishing that Resistance good Luck, and rejoicing at its Success; and yet the Dr. made this Exception the Instance of an unjust Resistance, by an ironical Assertion of *the late King's solemnly disclaiming the least Imputation of Resistance, in his Declaration*, for ironical it must be, every one being sensible he knew the contrary.

That tho' it was 20 Years since the Revolution, it was but lately the Pretender had attempted to invade us, and set the Revolution aside; tho' he cou'd have no Pretence to the Crown, unless the Prisoner's political Divinity was true, which they averr'd it
was

was not; and least the Pretender should apprehend his Friends were much encreas'd, when he heard that the Revolution was publicly branded in Sermons, as *black and odious*, they had impeach'd this Preacher, and brought him to their Lordships Bar for Justice, that he might not do it with Impunity.

Mr. Walpole's
Argument, in
maintenance
of the first
Article.

809.

Mr. Walpole, in Maintenance of the first Article, said, That the great Licentiousness of the Press, in censuring the Government, had of late given just Cause of Offence, but while none but mercenary Scriblers, and the hackney Pens of a discontented Party were employ'd, to vent their Malice, it was fit to leave them to the ordinary Course of the Law, but when the Trumpet was founded in *Sion*, when the Cause of the Enemies of the Government, was call'd the Cause of God, and of the Church, and the People were taught, for their Souls and Consciences sakes, to swallow these pernicious Doctrines, the Commons thought it high time for the Authority of Parliament to interpose, and exert it self in Defence of the Revolution, the present Government, and the Protestant Succession, founded upon that Revolution.

That all the Dr. had alledg'd in his Defence, was, That at the Revolution there was no Resistance at all, and that the King did utterly disclaim such Imputation. But if there was a Resistance, as undoubtedly there was, to bring about the Revolution, it would follow, That all the Censures which are so freely bestow'd upon Resistance in general, must attend, and be imputed to the Revolution.

810.

And if *Resistance, on any Pretence whatsoever*, be a Sin, which, unrepented of, according to the Doctrine of the Church, carries with it *sure and certain Damnation*, then ought every Man, who was assisting or consenting to this damnable Sin, make all possible Amends and Restitution; and of what Consequence the preaching of such Doctrines, without Reserve or Exception, must be, their Lordships cou'd not but apprehend, and it must be sufficient to satisfy them, that Dr. Sacheverel was guilty of the Charge exhibited in the first Article; and

and that he was an Offender of that Nature and Malignity, that this Court only cou'd be the proper Judges of such High Crimes; and from their Lordships Justice, the Commons hop'd that his Punishment wou'd be adequate to the heinousness of his Offence.

Sir *John Hawles* also being assign'd by the Com. Sir *John* mons, to assist in maintaining the first Article, he *Hawles's Ar-* observ'd, That the Dr. did not advance this Do-*gument*, in strine of absolute unconditionn'l Obedience to the maintenance of the first Ar-
supreme Power, with any Design to instruct his Congregation, but in Order to shock and lay odious Colours upon the Revolution, or the Means whereby it was brought about: And he said, he wou'd shew, That the Dr. was guilty of what he was charg'd with in this Article, even by the Doctrine himself had laid down.

That he carried his Doctrine somewhat farther 811: than the Apostles did, in some Respects, but in others he seem'd to restrain it: In the restraining part he seem'd to confine the absolute and unconditional Obedience to *Things lawful*; tho' in Truth, upon Examination, this Restraint was nothing, for where the supreme Power commanded, Who shou'd be Judge of the Lawfulness of the Command, the supreme Power, or the Subject? In the Reason of the Thing, neither of them were proper Judges; and there being no higher Power to appeal to, the supreme Power, from whom there cou'd be no Appeal, must needs be Judge. But though the Dr. seem'd to have restrain'd the Doctrine of *Non-Resistance*, he had, on the other side, enlarg'd his Doctrine of *Absolute Obedience*: For he had extended that to an active Obedience, whereas the Apostles, and others after them, seem'd to restrain it only to Passive Obedience; and the Apostles thought that sufficient to secure the *Roman* Government, under which they liv'd; but he agreed with the Dr. if that was not sufficient to secure the Government under which we liv'd (as it was not) the Dr. might very well think, that what he thus asserted, by the Equity and Reason of the Doctrine preach'd by the Apostles, was well warranted.

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And

And being agreed with the Dr. as to Subjects Obedience to the supreme Powers, he cou'd not imagine how the Dr. cou'd justify himself, in declaring against the Revolution, when he knew that the Revolution had been justified by the supreme Power, in the Acts of Parliament before mentioned, for tho' the Dr. wou'd have it believ'd, that the Reason he was now prosecuted, was, for the Doctrine he asserted, of Obedience to the supreme Power; he might have preach'd to that Purpose as long as he pleas'd, if he had not taken upon him, on that Pretence, to have cast odious Colours upon the Revolution.

That the Dr. ought to have considered, what our Saviour and his Apostles did in their Time; they never question'd the Title of the Emperors, under whose Government they liv'd, and yet, if they had thought it lawful or expedient, they had just Occasions to have done it: St. John was said to live till the Reign of *Trajan*, so that he had liv'd under thirteen Emperors, (including *Augustus* and *Trajan*) and none of them had any Pretence of Right to the Empire, according to our Notions of Right.

Augustus came to the Empire by the worst Means of any of them, for he waded thro' a Sea of Blood, and was guilty of many Acts of Treachery and Cruelty; but after the World had reap'd so many Benefits by his excellent Government, it forgot the Iniquity of the Means whereby the Empire was obtain'd: That the best Means of obtaining the Empire, by the following Emperors, till the Time of *Titus Vespasian*, were by Force, and most of them by treacherous Murders, and yet neither our Saviour or his Apostles reproach'd any of these Emperors with the Injustice of the Means whereby they became so.

813. And he observ'd, That the Dr. in the 19th Page of his Sermon, has this Passage, viz. *That old Leaven of their Forefathers, is still working in the present Generation; this traditional Poison still remains in this Brood of Vipers, to sting us to Death, is sufficiently visible, as to the dangerous Encroachment they now make upon our Government, and the*

the treasonable Reflection they have publish'd, upon Her Majesty, whose Hereditary Right to the Throne they have had the Impudence to deny and cancel, to make her a Creature of their own Power; and that by the same Principles they plac'd a Crown upon her, they tell us they (that is the Mob) may reassume it at their Pleasure.

Now the Word *Mob*, he observ'd, as the Dr. has us'd it in this place, can signify nothing else than the Body of the People of *England*; for he asserts, *They say that they plac'd a Crown upon Her Majesty, and from thence makes an Inference, that they may reassume it at their Pleasure; by which he must intend what was done in respect of Her Majesty, by the Bill of Rights; wherein 'tis said, That the Lords Spiritual and Temporal, and Commons in Parliament assembled, did declare Her Majesty, after the Death of the late King, and late Queen, without Heirs of her Body, was lawful and rightful Queen of this Realm.*

Now tho' Her Majesty hath an Hereditary Right to the Crown, and so is not so much concern'd in this Declaration as the late King and Queen, yet if that A&t did not confer a Title to the late King and Queen, they were no better than Usurpers. And tho' that Bill of Rights was afterwards confirm'd, by an A&t of the Second Year of their Reign, that wou'd not mend the Matter, for if they did not by the Bill of Rights obtain a Right to the Crown of this Realm, they were no more King and Queen of this Realm, than they were before.

But the Truth was; when a Government was brought out of frame, by the extraordinary Steps of a Prince, it was in vain to hope it ever cou'd be set right by regular Steps: Nevertheless, those Methods which have been found necessary to set the Government in a right Frame again, have been always taken to be legal, tho' by the Nicety of Law they cou'd not well be justified.

Upon the Change of Government from *Richard* the Second to *Henry* the Fourth, the Parliament call'd by King *Richard* continued to sit in the Time of *Henry* the Fourth; which was never practis'd before for.

A Parliament call'd by one Prince, continues to sit in the Reign of the Successor.

before, or warranted by any Law, and yet what was then done, was allow'd to be legal.

Held that the Crown purges all Attainders.

That in the Time of *Henry* the Seventh, he and his Friends being attainted of High Treason, which according to the Rules of Law at that Time, prevented the Descent of the Crown on him: The Judges came to a Resolution, according to the Exigence of the Thing, and declar'd, that Sir *William Stanley's* placing the Crown upon the Earl of *Richmond's* Head, purg'd his Attainder, and he thereby became King of *England*, and the King was thereby enabled to constitute Judges, and the Judges to reverse the Attainder of the King's Friends.

Hen. 7. a King *de facto*, and yet his Acts never questi- on'd.

And tho' King *Henry* the Seventh married the Heiress of the House of *York*, and was thereby (as was commonly said) King in her Right, yet he would never own her Title, or suffer her to join with him in any Act of Government, or ever declar'd by what Title he possess'd the Crown, and yet none of the Acts pass'd in his Reign, or any thing then transacted, was afterwards question'd, on Account of his Title to the Crown; that 'twas true there was an Act pass'd in his Time, indemnifying those who shou'd assist the King *de facto*, whether he had Right to the Crown or no; but if

814. *Henry* the Seventh was not King, the Acts pass'd in his Reign, would have been of no more Validity, than the Acts pass'd in the Time of *Cromwel*, or any other Usurper.

That it was the little Knowledge the Dr. had in these Matters, that induc'd him to affirm, That the Declaration the Parliament made of the Queen's Title to the Crown, was a cancelling of her Title by Descent, for those Titles were very consistent, and Princes who have claim'd by several Titles, have not always made their Choice on which they relied: *Henry* the Eighth, who was Heir both of the House of *York* and the House of *Lancaster*, never declar'd by which Title he claim'd: Queen *Q. Eliz* Heir *Elizabeth*, who was both Heir, and Devisee of her and Devisee Father, (who was enabled by Parliament to limit of her Father. the Succession of the Crown by his Will) yet had an Act

Act of Parliament on her Accession, to recognize her Title; which was to the same Purpose with the Bill of Rights, in respect of Her Majesty's Title to the Crown.

As to that part of the Doctor's Answer, where he says, *Hard is the Lot of the Ministers of the Gospel, if when they cite the Word of God, in their general Exhortations to Piety and Virtue, the several Texts by them cited, shou'd be said to be by them meant of particular Persons and Things;* this Complaint, he thought, was very unreasonable; and appeal'd to their Lordships Judgments, whether the Texts and Passages cited out of his Sermon, cou'd bear any other Construction, than had been put upon them.

He concluded, he shou'd forbear further to aggravate the Doctor's Crimes, but wou'd follow the Example of the Commons, who tho' they demand'd Judgment against him, had done it in much Mercy; for they might have charg'd these Matters against the Dr. as High Treason, which they had call'd only High Crimes and Misdemeanors: And it was a Rule in Law, That the Court in which a Prosecution is had, cannot call the Crimes greater than what the Prosecutor has charg'd them; or adjudge a greater Punishment to the Crimes than usual, but in some Cases might lessen the Punishment for such Crimes; and whatever Censure their Lordships shou'd pass on this Criminal, the Commons wou'd be well satisfied with it.

Major-General Stanhope being also assign'd to maintain the first Article, he said, He shou'd more particularly apply himself to show, that the Dr. had advanc'd this Doctrine (as the Preamble of the Articles sets forth) *with a wicked and malicious Intention to undermine and subvert Her Majesty's Government, and the Protestant Succession, to defame Her Majesty's Administration, asperse the Memory of his late Majesty, and condemn the Revolution.*

And he said, To assert in general Terms the absolute Illegality of Resistance, on any Pretence, as the Dr. and all the profess'd Enemies of the Government,

The Judgment must be suitable to the Charge.

And a Court cannot exceed the usual Punishments.

Mr. Stanhope's Argument, in maintenance of the first Article,

vernment, did, must be understood to overthrow Her Majesty's Title and Government, since at the same Time they skreen'd themselves under the Notion of professing absolute and passive Obedience to the supreme Powers, they cou'd not conceal their true Meaning, *viz.* That the real Object of their darling Doctrines, (such as *Jus Divinum, Non-Resistance, the Undefeasible, Unalienable, Hereditary Right,*) was a Prince on the other side the Water.

They cou'd not otherwise be consistent with themselves: For in the same Discourse to preach passive unlimited Obedience to Magistrates, and to revile and defame the Magistrates; to preach Non-Resistance, on any Pretence whatsoever, and to encourage Sedition, were such Contradictions as cou'd no otherwise be reconciled, than by concluding what was very plain from their Conduct, That however they were pleas'd to colour and disguise their Discourses, their true End was to alienate the Peoples Affections from their present Governors, and to insinuate, That the Revolution it self was an Usurpation; and whatever had been built on that Foundation, was wrong, and to misrepresent those who had a Hand in it, as *Rebels and Traitors.*

That it was not very material, what the Opinions of some Divines had been, concerning Non-Resistance; it was sufficient to know what the Practice of the Church of *England* had been, when it found it self oppress'd; and they might appeal to the Practice of all Churches and Nations in the World, how they behav'd themselves, when they found their Civil and Religious Constitutions invaded and oppress'd by Tyranny.

Mr. Stanhope

held, That all Governments begun by Resistance or Compact.

And he believ'd there was not that Government in the World, but had its beginning in Resistance or Compact: And if Compact was admitted, there must be admitted likewise a Right to defend those Rights, accruing by such Compact: Nor cou'd the municipal Laws of a Country, which were only made for the common Course of Things, ever be under-

understood to have been design'd to defeat the End of all Laws whatsoever.

And that a Latitude was left to the Subjects, in Cases of Extremity, he inferr'd, from this Passage in Dr. Atterbury's Sermon before the Convocation, viz. *But when, and upon what Causes it may be lawful to oppose the Power of the Prince, and assert our Liberties, the Scriptures do not say, unless in Cases when Men shall command Things contrary to the Laws of God; when that shall happen, St. Peter tells what we must do, We must obey God before Men.* And he appeal'd to their Lordships, Whether the whole Course of King James's Reign was not a Series of illegal Commands, calculated to destroy our holy Religion; and to violate all our Religious and Civil Rights.

He cited also the following Passage out of Dr. Atterbury's Sermon, viz. *But in such Cases, you must advise with the Lawyers, and those learned in Politicks, and have Recourse to the Laws and Constitutions, peculiar to each several Country, as to the Springs and Fountains of this Knowledge.*

He said, That in Compliance with this Advice of the Dean's, he had consulted those who were learned in the Laws of Nations and Politicks, and particularly Grotius, who was of as good Authority with the Divines of our Church, as any that had wrote about them; and in his Treatise *De Jure Belli & pacis*, Book 1. Chap. 4. Sect. 13. he 816: has this Passage, viz. *If the King hath one part of the supreme Power, and the other part is in the Senate, or People, when the King shall invade that part that doth not belong to him, it shall be lawful to oppose a just Force to him, because his Power doth not extend so far. Which Position I hold to be true, even tho' the Power of making War shou'd be vested only in the King; which must be understood only to relate to Foreign War: For as for home, it is impossible for any to have a Share of the supreme Power, and not to have likewise a Right to defend that Share.* Grotius's Opinion of Resistance, in a limited Monarchy.

This Passage, he said, was exactly adapted to the Constitution of *England*, and the latter part of it agreeable to the Maxim, *That where-ever there is a Right, there is a Remedy*. Now, that the Lords, the Commons, and every Subject of *Great Britain*, have Rights, cou'd not be denied: And to say, That when a Prince shall invade all these Rights at once, the whole Collective Body of the Nation has no way to vindicate these Rights, is so inconsistent, and contrary to Reason, that 'twas to be wonder'd it cou'd ever enter into the Mind of Man: And he said he cou'd evince from *Fortescue* and *Hooker*, that the Constitution of *England* was founded upon Compact, and that the Subjects of this Kingdom have, in their several publick and private Capacities, as legal a Title to what are their Rights by Law, as the Prince to the Possession of his Crown.

That the Resistance at the Revolution was necessary, and therefore just; and it was then by no good Man thought *a black and odious Crime*, to take up Arms for the Defence of his Country: Many of their Lordships, and the best part of the Nation were concern'd in it, and with much Gratitude to the Greatest of Queens, they remembred, how great a Share Her Majesty had in promoting that Revolution: And after this, that the Dr. shou'd presume to give the injurious Epithets of *Republicans*, of *Enemies and Traitors to Church and State*, to those who were concern'd in that Resistance, it might have become him to have consider'd first who were concern'd and had a share in it.

817. He said, The Principles broach'd in the Doctor's Sermon, well enough became profess'd *Jacobites*, and had they confined themselves to their own Conventicles, it might have been consistent with the Indulgence of the mildest Government, to suffer them to enjoy the Toleration, how destructive soever their Principles were to the Publick: But when they shou'd vent their Treasons abroad, and occasionally Conform, and take the Oaths to the Government, the better to destroy it: When they shou'd
abjure

abjure the pretended Prince of *Wales*, but not forget him; and when the Pulpit (even of our Metropolis) shou'd be prostituted and polluted, by venting Sedition against the best of Queens, it was high time for their Lordships to animadvert upon it.

And as to the Administration the Dr. had so maliciously defam'd, there never had in any Age been a more universally Glorious Administration than the present, as Her Majesty's unparallel'd Successes, by Sea and Land proclaim'd, and now she had reduc'd her Enemies to sue for Peace, and we were about to reap the Fruits of a long and expensive War, by the Conclusion of a solid and lasting Peace: At such a critical Juncture, at a Time when it behov'd us, more than ever, to preserve that Union amongst our selves, upon which the Union of the whole Alliance depended, and consequently, the Safety and Honour of our Chuach and State. Then did this Pious Son of the Church, this Loyal Subject, this Passive Obedience Gentleman, endeavour to create groundless Mistrusts and Jealousies of the Administration: Tho' indeed, the honest Citizens of *London* heard this Trumpeter of Sedition, he said, with Indignation, their Affection to the Government was not to be shaken, and all the Artificial Suggestions of such *false Brethren* cou'd never lessen their Affection to Her Majesty. 818.

He said, This Man, indeed, was but an inconsiderable Tool of a Party, not worth the Trouble they had given their Lordships; but the Commons look'd upon it that their Lordships Judgment in this Case wou'd be giving a Sanction, which shou'd determine what Doctrines of this Kind shou'd, or shou'd not be preach'd; and they hop'd their Lordships wou'd inflict such condign Punishment on this Offender, as shou'd deter others from the like Insolence for the future.

Sir *Peter King* being appointed to assist in making Sir *Pet. King's* out the second Article, viz. *That the Dr. had as- Argument, in firm'd and maintain'd, That the Toleration grant-maintenance ed by Law was unreasonable, and the Allowance of the second of it unwarrantable, &c.* He said, As to that Article. part of the Doctor's Answer, where he says, That 819.

he had not been able to inform himself that a Toleration had been granted by Law; 'twas true, the Word *Toleration*, was not mention'd in the Act, any more than the Word *Indulgence*, but every Body knew, that the Exemption granted to the Dissenters, by the first of *W.* and *M.* was commonly call'd, *The Toleration Act*; And that the Intent of that Act was, to tolerate and allow Persons qualified by that Act, to exercise their Religion, notwithstanding the Penal Laws to the contrary. And that *Toleration* was really a Word of less Import than *Indulgence*; it was a bare Permission or Allowance, and the Word had gain'd such a fix'd Signification, that whenever it was mention'd, there was not any Doubt what was meant by it, not only in common Conversation, but in the most publick Acts of State; the Queen, in her Speech, stil'd it, *The Toleration*; as did the Commons, in their Address, and the Dr. himself, in the 14th Page of his Sermon, calls the Indulgence granted by that Act, *The Toleration*; where he says, *The Toleration was never intended to indulge and cherish such Monsters and Vipers in our Bosom.* And at the 19th Page, speaking of the Dissenters, he says, *Now they have advanc'd themselves from the Religious Liberty our gracious Sovereign has indulg'd them, to claim a Civil Right, as they term it, and to jostle the Church out of her Establishment, by hoisting their Toleration into its Place*; so that he very well knew, that that Indulgence which was granted by the 1 *W.* and *M.* was commonly call'd, *The Toleration*; and tho' the Dr. at the 20th Page, says, *He wou'd not be misunderstood, as if he intended to cast the least invidious Reflection on that Indulgence the Government had condescended to give them, &c.* Yet having just before commended the Severities us'd against Dissenters in the Reign of Queen *Elizabeth*, which cou'd not be spoken in Commendation of the Toleration, but must be understood to be a Condemnation of it, because it remov'd and took away those Severities, that dry Caution wou'd not excuse him, especially since in other parts of his Sermon he plainly

plainly condemn'd the Toleration, and censur'd it as unreasonable, and the Allowance of it unwarrantable; particularly in the 10th Page of his Sermon, where he says, *So that in all those Cases beforemention'd, whosoever presumes to innovate, alter, or misrepresent any Point in the Articles of the Faith of our Church, ought to be arraigned as a Traitor to our State, Heterodoxy in the Doctrines of the one, naturally producing, and almost necessarily inferring, Rebellion and High Treason in the other; and consequently a Crime that concerns the Civil Magistrate as much to punish and restrain, as the Ecclesiastical.*

That this Passage was contain'd in his Second Head of *False Brethren*, but there was not one Article of the Faith of the Church under that Head, 820. and therefore they must have Reference to what is contain'd in a former Paragraph, viz. in his first Head of *False Brethren*, where he enumerates several Articles and Rights of the Church, the Disbelievers or Deniers whereof are stil'd, *False Brethren*, and amongst others he brands him for being false to the Interest of the Church, who gives up any Point of the Discipline and Worship: And says, *Shou'd any Man, out of Ignorance, or Prejudice to the ancient Rights and essential Constitution of the Church, affirm, That the Divine Apostolical Institution of Episcopacy is a novel Doctrine, not sufficiently warranted by Scripture, and that 'tis indifferent whether the Church is govern'd by Bishops or Presbyters: Is not such a one an Apostate from his own Orders?* Now the Dissenters are, by the Toleration, exempted from subscribing the Thirty-sixth Article, viz. *That the Book of Consecration of Archbishops and Bishops, and of the Ordination of Priests and Deacons, set forth in the Times of King Edward the Sixth, contain in it all Things necessary to their Consecration and Ordination, and hath nothing in it either superstitious or impious:* And notwithstanding this Innovation, or Alteration of this Article of the Church by the Dissenters, the Law does nevertheless tolerate and in-

The Dissenters
excus'd from
subscribing
the 39 Arti-
cles.

dulge them: But the Dr. affirms, That *whoever alters, innovates, or misrepresents this Point, in the Articles of the Faith of our Church, ought to be arraign'd as a Traitor to the State, and punish'd as well by the Temporal as the Ecclesiastical Magistrate.*

The Quakers
Declaration.

Privileges of
the Dissenting
Teachers.

Some of the Dissenters are exempted by the Toleration, from subscribing Three and a half of the Thirty-nine Articles; others are exempted from subscribing that concerning Infant-Baptism; and the Quakers are exempted from subscribing any of the Articles, and are only required to make a short Declaration of their believing the Trinity, and that the Scriptures are given by divine Inspiration: And all these several sorts of Dissenters, notwithstanding their Heterodoxy in these Points, are exempted from the Penalties of former Laws, and have several Privileges and Immunities given them, as, an Exemption of their Teachers from Parish-Offices, and a Penalty for disturbing their Congregations.

Now when this is establish'd by Law, and the Act of Toleration is in full Force, for the Dr. to affirm notwithstanding, That Heterodoxy, or a different Opinion from any of the Articles of Faith of our Church, almost necessarily infers Rebellion and High Treason in the State, and is a Crime that concerns the Civil Magistrate to punish, as well as the Ecclesiastical: What cou'd be a more direct breaking in upon, and disavowing of the Toleration than this? Was not this *to maintain the Toleration granted by Law to be unreasonable, and the Allowance of it unwarrantable?*

And another Passage which proved this general Charge, he said was to be found in the 16th and 17th Pages of his Sermon, viz. *What cou'd not be gain'd by Comprehension and Toleration, must be brought about by Moderation, and occasional Conformity: that is, What they cou'd not do by open Violence, they will not fail by secret Treachery to accomplish. If the Church can't be pull'd down, it may be blown up, and no matter with these Men how it's destroy'd, so that it is destroy'd.*

Was

Was not this calling the Toleration an open Violence to the Church, and affirming that it was an Attempt made to destroy the Church? (tho' the Church itself came into and settled this Toleration, and the Legislature in the Time of King *William* and Queen *Mary*, and particularly the Bishops, the Fathers of the Church, were very well satisfied that this Toleration granted to Dissenters, was no way prejudicial to the Safety and Security of the Church :) And for the Dr. to come and say the Toleration was intended to pull down the Church, and that it was an open Violence to the Church; What was this but to maintain, *That the Toleration was unreasonable, and the Allowance of it unwarrantable?*

As to the next part of the Charge in the Second Article, viz. That the Dr. asserted, *That he is a False Brother, with Relation to God, Religion, and the Church, who defends Toleration and Liberty of Conscience*; he cited the following Passage, in the 8th Page of his Sermon, viz.

' If upon all Occasions to comply with the Dissenters, both in publick and private Affairs, as
' Persons of tender Conscience and Piety; to promote their Interests in Elections, to speak to them
' for Places and Preferments, *to defend Toleration and Liberty of Conscience*, and, under the Pretence of Moderation, to excuse their Separation,
' and lay the Fault upon the true Sons of the Church, for carrying Matters too high; if to court
' the Fanaticks in private, and to hear them with
' Patience, if not Approbation, rail at, and blaspheme the Church, and, upon Occasion, to justify the King's Murder; if to flatter both the dead
' and the living in their Vices, and to tell the World, if they have Wit and Money enough, they need
' no Repentance, and that only Fools and Beggars can be damn'd; if these are the modish and fashionable Criteria of a true Churchman, God
' deliver us from all such False Brethren!

So that he made one Mark of these False Brethren to be, *the defending Toleration and Liberty of Conscience*: And as to that part of the Doctor's Answer,

swer, where he says, He does not mean, by this Description of a False Brother, those who *only* defend Toleration and Liberty of Conscience, *and do no more*, except at the same Time they lay the Fault of the Separation upon the true Sons of the Church, for carrying Matters too high, &c. he said, If this Passage was look'd into, it wou'd be found, that the several particular Characters there mentioned, are all of them so many particular Marks of a False Brother, and it was not necessary that two, or three, or all of them, shou'd meet together in one Person, to make up the Character of a

822. False Brother, but any one of them was sufficient to characterize him a False Brother: And his asserting *the defending of Toleration* to be a Mark of False Brother, was an evident Declaration against the Justice and Expediency of the Toleration.

And whether by his Reflection on Archbishop *Grindal*, he design'd to censure the Toleration, wou'd best appear from the Passage it self, at the 19th and 20th Pages of his Sermon, where he plainly shew'd, that the False Brethren there meant, were the Dissenters who were tolerated by Act of Parliament: 'These False Brethren (says he) have now advanc'd themselves from the Religious Liberty our Gracious Sovereign has indulg'd them to claim a Civil Right, and to juggle the Church out of her Establishment, by hoisting the Toleration into its place, and to convince us what alone will satisfy them, insolently demand the Repeal of the Corporation and Test Acts, as an Ecclesiastical Usurpation, which indeed, under Her Majesty, (whom God long preserve for its Support and Comfort) is the only Security the Church has to depend on, and which they have so far eluded, by their abominable Hypocrisies, as to have undermin'd her Foundations, and endanger the Government, by filling it with its profess'd Enemies. These Charges are so flagrant and undeniable, that a Man must be very weak, or something worse, that thinks or pretends the Dissenters are to be gain'd or won over by any other Grants and Indulgencies, than by giving up our whole Constitution;

tion: And he that recedes the least Tittle from it, to satisfy or ingratiate with these Clamorous, Insatiable, and Church-devouring Malignants, knows not what Spirit they are of, or he ought to shew who is a true Member of our Church.

And then it follows, 'Have they not, ever since their first unhappy Plantation in this Kingdom, by the Intercession of that false Son of the Church Bishop *Grindal*, always improv'd and rise upon their Demands, in the Permission of the Government? Infomuch, that Queen *Elizabeth*, who was deluded by that perfidious Prelate, to the Toleration of the *Genevian* Discipline, (*i.e.* the Discipline and Polity of the Dissenters) found it such a headstrong and encroaching Monster, that in eight Years she foresaw it wou'd endanger the Monatchy, as well as the Hierarchy: And like a Queen of true Resolution and pious Zeal for both, pronounc'd, That such were the restless Spirits of that factious People, that no Quiet was to be expected from them, till they were utterly suppress'd; which, like a prudent Princess, she did, by *wholsome Severities*, that the Crown, for many Years, sat easy and flourishing on her Head.'

Now here he calls the Archbishop a *False Son of the Church*, and a *Perfidious Prelate*, for inducing the Queen to give a Toleration to the Dissenters in those Days; and what is this, in effect, but to declare that the Parliament were in the wrong, in granting a Toleration to the Dissenters, and that the Bishops who were for tolerating the Dissenters, were neither Fathers or Sons of the Church, but Corrupt and Perfidious Prelates: And what cou'd he do more, to enflame the Government against the Dissenters, than by recommending it as a noble Resolution, and pious Zeal in Queen *Elizabeth*, utterly to suppress the Dissenters; and to recommend the Severities us'd in her Reign, because they were *wholesome* in themselves, and of happy Consequence to the Person and Government of that renowned Queen.

And

And what were these wholesome Severities? Why, some Hereticks were burnt, other Persons were hang'd, some had their Goods confiscated, and others were imprison'd; and by an Act pass'd in the 35 of *Eliz.* intitled, *An Act to retain the Queen's Majesty's Subjects in their due Obedience*, the Dissenters are, among other Penalties, requir'd to abjure the Realm, or suffer Death without Benefit of Clergy.

Abjuring the Realm, what was meant by This Penalty of Abjuration was taken from the ancient Common Law, in relation to Felony, by which if a Man committed any Felony, except Sacrilege, and fled to a Parish-Church, he might, within Forty Days, confess the Felony before the Coroner, and take an Oath to abjure the Realm for ever, and if he thus confess'd, and took the Oath, he was thereby attainted of the Felony; and then he had Forty Days, from the coming of the Coroner, to provide and prepare for his Voyage; and the Coroner assign'd him such a Port as he chose, for his Departure out of the Kingdom; and if he neglected to transport himself, or return'd without License, he had Judgment to be hang'd, except he was a Clerk, and then he had his Clergy.

Dissenters to abjure the Realm, by 35 *Eliz.*

This Practice of Abjuration, being by several Regulations in the Time of *Hen. 8.* in effect, taken away, was reviv'd, as a wholesome Severity, fit to be inflict'd on Protestant Dissenters, by the 35th of *Eliz.* but the Abjuration by this Act, was worse than the Abjuration for Felony at Common Law, for there they had the Benefit of Clergy, which by this Act they had not.

But however, this might be esteem'd an wholesome Severity in those Days, the present Legislature had determin'd it to be unwholesome for these Times, and the Toleration Act did expressly exempt the Protestant Dissenters from the Penalties of this Act of the 35th of *Eliz.* And yet the Dr. again recommends those Penalties and Severities, as wholesome and necessary, and fit to be reviv'd; which must be look'd upon as an express Declaration against the Toleration Act.

That

That his reflecting on Bishop Grindal is not charg'd on the Dr. alone as a High Crime and Misdemeanor, but as an Aggravation of his Crime, and to shew his Zeal against the Toleration; that he was not contented with censuring the Toleration it self, but must rake into the Ashes of an Archbishop, that had been in his Grave 120 Years, and blacken his Memory, because he was for tolerating those People who were now by Law tolerated.

And as to this Archbishop, it was true, he did fall under the Displeasure of Queen Elizabeth, for encouraging the Meetings, and Exercisings of the Clergy in those Days, call'd Prophesyings. These Meetings were misrepresented to the Queen, and his encouraging them was the visible Cause of his Disgrace; tho' Historians said it sprung from the Earl of Leiceſter's Hatred to him, because he wou'd not ⁸²⁴ *Quere, the true Reasons of* grace. Alien Lambeth-House to him, and censuring *Julio* his Physician for Adultery: But that the Archbishop, for his Life and Doctrine, was one of the most Pious, Learned, and Considerable Prelates of his Time, and the Clergy had that extraordinary Esteem for him, that while he was under the Displeasure of the Queen, a considerable Number of the Convocation petition'd the Queen to restore him; and therefore there was no Reason for the Dr. to asperse him, as a *False Son of the Church*, and a *Perfidious Prelate*.

As to the last Charge in this Article, viz. *The Doctor's asserting it to be the Duty of the Superior Pastors to thunder out their Ecclesiastical Anathema's against Persons entitled to the Benefit of the Toleration, and insolently defying any Power upon Earth to reverse those Sentences.*

The Dr. indeed, in his Answer, says, That the Persons entitled to the Benefit of the Toleration, are not by him mentioned or intended, but he intends those only who take Permission for Power, and advance Toleration immediately into an Establishment: But it might easily be collected whom he meant, from the 25th Page, where he says, 'If our Dissenters had liv'd in the Times of St. Paul, they wou'd have branded him as an intemperate, hot,

‘hot, furious Zealot, that wanted to be sweetned
 ‘by the gentle Spirit of Charity and Moderation,
 ‘forsooth. Schism and Faction are Things of im-
 ‘pudent and encroaching Natures: They thrive up-
 ‘on Concessions, take Permission for Power, and ad-
 ‘vance a Toleration immediately into an Establish-
 ‘ment, and are therefore to be treated like growing
 ‘Mischiefs and infectious Plagues, kept at a Di-
 ‘stance, lest their deadly Contagion spread. *Let*
 ‘*us have no Fellowship with these Works of Dark-*
 ‘*ness, but rather reprove them.* Let our superior
 ‘Pastors do their Duty, in thundering out their Ec-
 ‘clesiastical Anathema’s, and let any Power on
 ‘Earth dare reverse a Sentence ratify’d in Heaven.’

825. And he said, The Dr. did in his Answer, in effect,
 own this Charge, for he affirm’d, ‘That some Sen-
 ‘tences pronounc’d by the Pastors of the Church,
 ‘are ratified in Heaven; that some Persons exempt-
 ‘ed from Punishment by the Laws of the Land,
 ‘may yet by the Laws of Christ be liable to such
 ‘Sentence: And that Schism, or a causeless Separ-
 ‘tion from a Church enjoining no sinful Terms of
 ‘Communion, is a Sin which exposes the Persons
 ‘guilty of it to the Censures of the Church.’

Now for the Dr. who was a Minister of the
 Church of *England*, and had submitted to the
 Queen’s Supremacy, and by the Canon was bound
 to maintain and preach the Queen’s Supremacy, in
 all Causes, and over all Persons, Ecclesiastical and
 Civil: For him to come and say, That tho’ the
 Dissenters are tolerated by Act of Parliament, and
 exempted by Law from Penalties, yet let the Ec-
 clesiastical Pastors do their Duty, let them thunder
 out their Anathema’s, and let the Civil Magistrate,
 the Earthly Powers, dare to reverse them: This
 was not only a weakening and censuring the Tole-
 ration, but a direct impugning the Queen’s Supre-
 macy.

The Lord Wil-
 liam Paulet’s
 Argument, in
 Maintenance
 of the second
 Article.

The Lord *William Paulet*, being assign’d to as-
 sist in Maintenance of the Second Article, he said,
 That it had always been esteem’d one of the happy
 Consequences of the late Revolution, that Her Ma-
 jesty’s Protestant Subjects, by a legal Indulgence
 granted

Granted to the Dissenters, were united in Interest and Affection, in the Defence of Her Majesty's sacred Person and Government, that the Nation had seen the good Effects of it, many of the Dissenters having, since the Toleration, become sincere Converts to the Church, and that by this Toleration the Prejudices of the Dissenters in general wore off, and their Number daily decreas'd; and yet the Dr. had set forth this Toleration in the most odious Colours, and factiously endeavour'd to excite and stir up the People against it. 826

And as there cou'd hardly be given an Instance of so seditious and barefac'd an Attempt against the Peace and Quiet of the Kingdom, so the Commons rested assur'd that their Lordships wou'd, by an exemplary Punishment, suitable to so high a Crime, vindicate the Authority of Parliaments, and give an effectual Discouragement, for the future, to all such turbulent and seditious Preachers.

Mr. Spencer Comper being also appointed to assist, in Maintenance of the Second Article, he said, Mr. Comper's Argument, in He thought it unnecessary to urge all the Arguments maintenance that might be made use of to justify the Reasonableness of the second bleness of the Toleration granted to Protestant Dissenters; it was sufficient to say, that this Indulgence was requir'd from us as Christians, and as we were Men professing Humanity and Good Will towards one another: And that whoever maintain'd, *That the Toleration was unreasonable, and the Allowance of it unwarrantable*, evidently arraign'd the Act of Toleration. And he said, Nothing cou'd be more plain, than that many Passages in that infamous Libel [the Sermon] cast black and odious Reflections on the Toleration, and particularly, where 'tis said, *What cou'd not be gain'd by Comprehension and Toleration, must be brought about by Moderation and occasional Conformity: that is, What they cou'd not do by open Violence, they wou'd not fail by secret Treachery to accomplish, &c.* of the second Article.

Here he observ'd, Comprehension and Toleration were represented as open Violence, and Moderation and Occasional Conformity, as secret Treachery; and

827. and the Prisoner having thus inveighed against the *Toleration*, with much Ill-Nature and Bitterness of Spirit, was pleas'd, in the next place, to assert, *That he was a False Brother, with Relation to God, Religion, or the Church, who defended it.* And he conceiv'd the Doctor's Answer to this Charge was wholly evasive, there not having been one Word of *Universal Toleration*, or *Universal Liberty of Conscience* mention'd.

And as to his admonishing his superior Pastors to thunder out their Ecclesiastical Anathema's against the Persons intitled to the legal Indulgence, which Anathema's were stil'd, *Sentences ratified in Heaven, and such as no Power on Earth dare reverse.* It was far from him to say that Sentences ratified in Heaven, cou'd be revers'd by the Powers of this World; but if the Dr. were a superior Pastor, and shou'd Anathematize or Curse all those who enjoy'd the Benefit of the Toleration, he cou'd not believe that such a Sentence wou'd be ratified in Heaven.

He observ'd further, That the Dr. was not only for delivering over to Satan those who enjoy'd the Benefit of the Toleration, but those who defended it: And that his Anathema was very comprehensive, viz. *And as he chose it in this World, appoints him in the next, his Portion with Hypocrites and Unbelievers, with all Lyars, that have their Part in the Lake which burns with Fire and Brimstone, with the grand Father of Falshood, the Devil and his Angels.* And so here we leave our False Brethren, in the Company they always kept Correspondence with.

He said, Perhaps it might be equally dangerous to defend the Ashes of that Venerable Prelate Archbishop Grindal, whom the Dr. had charg'd as a *False Son of the Church, and a Perfidious Prelate*, because he deluded Queen Elizabeth to a Toleration of the *Genevian* Discipline: But for the sake of the Reformation, better Language, and more decent Expressions, shou'd have been bestow'd upon a Man who bore so considerable a Part in the Establishment of it.

That

That the Archbishop had been ever held in the highest Esteem, by all the Reformed Churches, but it was very immoral to cast Reflections upon the Dead, however ill they might have deserved; and tho' this alone, indeed, might not be a sufficient Ground for a Charge of High Crimes and Misdemeanors, yet when it appear'd that the Reason the Archbishop was so severely treated, was, on the Supposition he deluded the Queen to a *Toleration*, and that all his hard Words against him, were design'd maliciously to traduce and asperse the present Toleration, they were highly criminal.

He added, 'Twas too notorious, that this *Inflammatory* had stirr'd up unaccountable Feuds and Quarrels throughout the Nation; many, he said, were the Seeds of Sedition he had sown; and the Fruit to be expected was Civil Discord and Confusion, unless some Remedy shou'd be applied to prevent it, and therefore for the Safety of Her Majesty, and the Security of the Constitution, the Commons thought it absolutely necessary to bring him to answer for these High Crimes and Misdemeanors, before their Lordships Tribunal; conceiving his Offences to be of so exorbitant a Nature, that they deserv'd the Solemnity of this Proceeding. 828.

Then the Lords adjourn'd.

Third Day. *Wednesday*, the 1st of *March*.

The Court being sate, and the usual Proclamations made, the Lord Chancellor directed the Commons to proceed, then

Mr. *Thompson* being appointed to assist in Maintenance of the Third Article, said, That this Article Argument, in was founded on a Vote of the Lords and Commons, Maintenance made some few Years ago, when there were many of the third scandalous and seditious Rumors spread abroad of the Danger of the Church, and many Libels were dispers'd over the Kingdom, reviling Her Majesty's Administration in Church and State; particularly one entitled, *The Memorial of the Church of England*. That Her Majesty was pleas'd to take Notice of these seditious Reports, from the Throne, and that thereupon the Two Houses came to that Vote, Article.

or Resolution, mention'd in the Articles, *That the Church was in a safe and flourishing Condition, and that whoever shou'd suggest, That the Church was in Danger, under Her Majesty's Administration, was an Enemy to the Queen, the Church, and Kingdom, &c.*

That this Article did not only charge the Dr. with asserting, in Defiance of the said Vote, *That the Church was in a Condition of great Peril and Adversity, but with maliciously insinuating, That the Members who pass'd that Vote were themselves conspiring the Ruin of the Church, while they Voted it out of Danger, and alluding, by way of Parallel, to that Assembly who Voted the Person of King Charles to be out of Danger, at the same Time they were conspiring his Destruction.*

That the first Passage he shou'd produce to maintain this Article, was in the 5th Page of the Doctor's Sermon; where, having enumerated St. Paul's Misfortunes while he was propagating the Gospel, he says, 'There is a very observable Gradation in his Sufferings, but that of all his Calamities, the highest of them proceeded from False Brethren, And taking Notice of the Condition of the Church of Corinth, then followed these Words, 'Tho' it were very obvious to draw a Parallel here, betwixt the sad Circumstances of the Church of Corinth formerly, and of the Church of England at present, wherein her Holy Communion had been rent and divided by factious and schismatical Impostors, her pure Doctrine has been corrupted and defil'd, her primitive Worship and Discipline profan'd and abus'd, her sacred Orders denied and vilified, her Priests and Professors (like St. Paul) calumniated, misrepresented, and ridicul'd, her Altars and Sacraments prostituted to Hypocrites, Deists, Socinians, and Atheists; and this done, I wish I could not say, without Discouragement, I am sure with Impunity, not only by our profess'd Enemies, but, which is worse, by our pretended Friends and False Brethren.

Here he observ'd, That the Dr. affirm'd, All these Enormities were practis'd, not only without Discouragement, but with *Impunity*, not by profess'd Enemies, but by *False Brethren*; that he excluded vicious Infidels, Blasphemers, and Hereticks, who are profess'd Enemies, and lays it upon False Brethren: And he explain'd what sort of False Brethren he meant; for who cou'd prostitute Altars and Sacraments to Deists, Atheists, and Socinians, but some of his own Order? And who are to punish such Offences among the Clergy, but their Spiritual Superiors? And whether they were not part of Her Majesty's Administration, he submitted to their Lordships: But supposing there were such erroneous Doctrines publish'd, as the Dr. mention'd, they cou'd not be punish'd, unless they were prosecuted, and had the Dr. produc'd any of these Matters he complain'd of before a Court that had a proper Cognizance of them, and been denied Justice, then he might have had some Reason for his Complaint, but to blame his Superiors, for not punishing what they might be ignorant of (and of which he confess'd he was not, and might have prosecuted,) seem'd to retort the Guilt upon himself, which he wou'd lay upon them.

That the next Passage which supported this Charge, was at the 16th Page, where he mentions a *Comprehension* that was design'd, to unite the Church and Dissenters: And these False Brethren, who design'd this and worse Mischiefs, (as he says) cou'd be no other than those in Power; none else were capable of accomplishing that Design, of uniting the Dissenters and the Church: To which Design, and its Authors, he was pleas'd to give the most scurrilous Names, and charges them with a Design to blow up the Church by *Moderation*, which was one of the Vices the Dr. mention'd, as endangering the Church; but of this Vice, [*Moderation*] he said he must do the Dr. that Justice, to acquit him of the least Tincture of it in any of his Works.

A third Passage to support this Article, he said, was in the 18th Page, *viz. Falshood always implies*

Treachery; and whether this is a Qualification for any one to be trusted, especially with the Guardianship of our Church and Crown, let our Governors consider. And whether this Reflection did not aim higher than the Administration, he submitted to their Lordships.

That the next Passage was in Page the 20th, viz. 'And now, Are we under no Danger in these deplorable Circumstances? Must we lull ourselves under this sad Repose, and in such a stupid lethargick Security embrace our Ruin? When *Elisba*, the great Prophet of God, was surrounded with an Host of Enemies, that fought for his Life, his blind Servant beheld not the Peril his Master was in, till his Eyes were opened by a Miracle, and he found himself in the midst of Horses and Chariots of Fire. I pray God we be out of Danger, but we may remember, that the King's Person was Voted to be so, at the same Time that his Murderers were conspiring his Death.'

He said, Tho' the Dr. wou'd excuse himself, by saying, in his Answer, That these deplorable Circumstances proceeded from the Maturity of National Sins, &c. it was plain, he did insinuate and assert, That this Danger was occasion'd by the Diffention from the Church, which the Law apprehended to be no Danger to it, and therefore it did not become him to assert the contrary. And as to the Parallel between the Assembly who Voted King *Charles* out of Danger, and the Members who Voted the Church out of Danger, tho' the Dr. said he meant no Reflection on the Members who pass'd that Vote, because he never mention'd that Vote, and that they were not the same People who Voted King *Charles* out of Danger, that conspir'd his Ruin: The Dr. cou'd not be ignorant, that it was

§30. *Quere*, If the Manager is not mistaken, al and Death happen'd, every Body knew; and as to the Time tho' there might be some Alteration made in that the King was Assembly, during that Time, the Persons who convoted out of spir'd his Destruction, were part of that Assembly Danger. who Voted him out of Danger. And it was not to be

be doubted but the Dr. intended his Allusion in the same Manner.

And as to the Place of Scripture quoted by the Dr. viz. *That the blind Servant beheld not the Peril his Master Elisha was in, till his Eyes were opened by a Miracle, and he found himself in the midst of Horses and Chariots of Fire.* These *Horses and Chariots of Fire*, he observ'd, were not the Prophet's Enemies, but his Friends, they were a Security from his Enemies, so that he plainly perverted the Sense of that Text, to make a stronger Impression, and more effectually to delude the People.

The last Passage he cited to maintain this Article, was, in the last Page, where, speaking of the Danger of the Church, the Dr. quotes a Text, as out of *Lamentations*, viz. *Though she lies bleeding of the Wounds she receiv'd in the House of her Friends.* This Text he said he cou'd not find, and therefore it seem'd to be a Lamentation of the Doctor's own making. Then he observes the Dr. goes on, 'Tho' the Ways of *Sion* may mourn for a Time, and her Gates be desolate, her Priests sigh, and she in Bitterness, because her Adversaries are Chief, and her Enemies at present prosper; tho' among all her Lovers she has few to comfort her, and many of her Friends have dealt treacherously with her, and are become her Enemies.'

And these Passages, he said, he mention'd only to shew, that the Dr. by the most pathetick Expressions of his own, mix'd with these Texts of Scripture, endeavour'd to represent the Church of *England* to be in the utmost Danger.

And as to the Doctor's Pretence, That the Vote concerning the Church's Danger, cou'd not concern him, because it was made four Years ago; he shou'd have observ'd, that the Words were, *Whosoever shall go about to insinuate that the Church is in Danger, under Her Majesty's Administration;* and therefore it must relate to any Time during Her Majesty's Reign.

And that the Dr. (whose Education wou'd not permit us to presume he shou'd thro' Ignorance)

shou'd take upon him, in his private Capacity, to contradict the Sense of the whole Nation, and cast such Aspersions on his Superiors, this immoderate Zeal cou'd only be intended to animate a deluded People to the Execution of seditious Designs.

But the Commons were so well satisfied of their Lordships true Concern for the Preservation of the Constitution, that they cou'd not imagine they wou'd suffer such Attempts to pass without condign Punishment.

Mr. Compton's
Argument, in
Maintenance
of the third
Article.

Mr. Compton being also appointed to assist, in Maintenance of the third Article, he observ'd, That it had been one of the constant Artifices of the Enemies of the present happy Establishment, to insinuate, That the Church was in a Condition of great Peril and Adversity, in order to cover Designs they dare not publickly own; but that this Assertion was never so boldly maintain'd, or with such invidious and aggravating Circumstances, as by the Criminal at their Lordship's Bar.

That notwithstanding the great Benefits the Church, of which he was a Member, reap'd by the Revolution, he made that the very Period of Time when the Enemies of our Church first had Hopes to deliver her up to her worst Adversaries, and that ever since there had been a continued Series of Contrivances to ruin and destroy it; at the Revolution by open Violence, but now, under Her Majesty's Administration, by secret Treachery; and since neither the late nor the present Reign cou'd escape his Invectives, for what Person he reserv'd his Panegyrics, was submitted to their Lordships.

And he observ'd, That the Parliament which pass'd the Vote, concerning the Safety of the Church under Her Majesty's Administration, and which the Dr. had so vilified, had Her Majesty's Thanks for their Unanimity and Zeal for her Service; and that it was this Parliament which concurr'd with Her Majesty in compleating the Union of the two Kingdoms, and disappointing the Attempts of the Pretender, and there cou'd be no Ground to compare the dutiful Proceedings of such a Parliament, with what was done in those unhappy

happy Times, with which he wou'd maliciously draw a Parallel: Nor cou'd there be found the least Resemblance between Her Majesty's Glorious Reign, and that unfortunate Administration, unless that there were then, as now, *Ministers of the Church, who by their Function being Messengers of Peace, set up to be Trumpeters of Sedition, and Incendiaries to Rebellion*, but the Commons hop'd, that even this Resemblance wou'd be determin'd, by their Lordships fixing such an exemplary Punishment on this Offender, as shou'd deter others from endeavouring to distract the Kingdom with such groundless Distrusts and Jealousies for the future.

The Lord Coningsby being also appointed to assist, in supporting the third Article, he said, That the Sermon preach'd by the Dr. at St. Paul's, from the first Word in the Title-Page, to the last Line in the Conclusion, was one malicious and seditious Assertion, That the Church of *England* was, under the last Reign, and is under the present, in the utmost Peril and Danger.

L. Coningsby's
Argument in
Maintenance
of the third
Article.

But it was plain, from this seditious and rebellious Discourse, that the Dr. and those in Combination with him, had nothing more at Heart, than to destroy the present Church; as not being agreeable with the flaming Opinions of such Firebrands, who knew not of what Spirit they were of: And this in Order to set up a Scheme of a Church agreeable to the Tyrannical one they had projected for the State. A Church, (the Doctor's, he meant) tho' in Pretence Protestant, that wou'd be ready soon to be turn'd into a Monster, by adding to it self a Popish Head.

A Church, that wou'd destroy all that were concern'd in the late happy Revolution: A Church, which upon Antichristian Principles, profess'd Burning, for Conscience sake; which the Dr. like those wicked Men whose Mercies were cruel, call'd *Wholesome Severities*: And therefore hop'd that their Lordships, in Justice to the Queen, Themselves, and the Commons, would deter others from ever being guilty of the like heinous Offence.

Mr. Dolben's
Argument, in
Maintenance
of the third
Article.

Mr. Dolben being assign'd to assist in support-
ing the third Article, said, Whether that wicked
Parallel of the Doctor's might not justly be turn'd
upon him, he submitted to their Lordships: And
whether there was not more than a Suspicion, that
he, and all his Abettors, were conspiring the Ruin
and Destruction of the Church, while under the
Disguise of a false Zeal, they prostituted her sa-
cred Name, to carry on dark and deep Designs, fa-
tal to Church and State.

833.

He said, Their Lordships had now at their Bar,
a Clergyman; one, who by his Function ought to
instruct and propagate the necessary Means for the
Peoples true Happiness in this World, as well as the
next, who yet prov'd to be a Trumpeter itinerant,
of Sedition and Rebellion, and an Asserter of such
pestilential Doctrines, as at once overthrow the
whole Constitution, both in Church and State.

That they had brought this Offender before their
Lordships, not only to detect and punish his Of-
fence, but to obtain an Occasion, in the most pub-
lick Manner to avow the Principles, and justify the
Means on which the present Government, and the
Protestant Succession was founded; and this more
out of a generous Concern for Posterity, than them-
selves, who had nothing to fear from so Gracious a
Princess as at present fill'd the Throne: But they
hop'd the Record of this Proceeding wou'd remain
a lasting Monument to deter a Successor that might
inherit her Crowns, but not her Virtues, from at-
tempting to invade the Laws, or the Peoples
Rights: And if not, however it wou'd be a noble
Precedent to excite Posterity to wrestle and tug for
Liberty as they had done.

He said, they might take up a much juster Com-
plaint than that in the Doctor's Answer, viz. That
hard was the Fate of that People, who after ha-
ving been Twenty Years in War, in Conjunction
with so many great Allies, with the Expence of so
much Blood and Treasure, contending against Ty-
ranny and Oppression, and which they might justly
hope they had at last subdued, and when they
shou'd see all Europe enjoy the Fruits of their La-
bours;

bours; that themselves only must be rendred incapable of the Common Blessing, *Betray'd at home to a perpetual Condition of Bondage, by such False Brethren as were at their Lordships Bar.*

Upon this Expression, the Lord *Haversham* mov'd the Lords to adjourn; which they did: And being return'd, the Lord Chancellor told Mr. *Dolben*, the Lords were of Opinion, those Words, *As are at your Lordships Bar*, were so general, they needed an Explanation, whereupon Mr. *Dolben* said, they had Relation only to the *Prisoner at the Bar*.

Mr. Serjeant *Parker*, being assign'd to maintain the fourth Article, he observ'd, That the avow'd Design of the Doctor's Sermon, was, to represent the extreme Perils and Distresses of the Church and Constitution from False Brethren that were in the Administration, and countenanc'd by it. 834.

Mr. Serj. Parker's Argument in maintenance of the fourth Art.

And he begun with the second Clause in this Article, viz. *That the said Henry Sacheverel, in his Sermons and Books, doth falsely and maliciously suggest, That there are Men of Characters and Stations, in Church and State, who were False Brethren, and do themselves weaken, undermine and betray, and do encourage, and put it into the Power of others, who are profess'd Enemies, to overthrow and destroy the Constitution and Establishment.*

To make out this, he observ'd, That the Dr. entering upon his Second Head, where he shews the great Perils and Mischiefs of these False Brethren, both in Church and State, asserted, p. 15. *That they weaken, undermine and betray, in themselves, and encourage and put it in the Power of our profess'd Enemies, to overturn and destroy the Constitution and Establishment of both.* That this therefore run thro' his whole Discourse, and being affirm'd of False Brethren in general, must be applied to every sort of False Brother; and consequently, if there were Men of Characters and Stations, whom he represented as False Brethren, then he had affirm'd of them, and undertaken to prove, that they did weaken, undermine and betray, &c.

That

That under his Third Head, p. 21. where he shews the Malignity and Guilt of this Sin, he says, 'What a vast Scandal and Offence must it be to all Persons of Piety and Integrity, to see Men of Characters and Stations, thus shift and prevaricate with their Principles, and starting from their Religion, upon any Occasion of Difficulty or Trial, and, like the Disciples flying from, and forsaking our Saviour, when his Life lay at stake, to see Mens Opinions sit as loose, almost, as their Garments, to be put on, or off, for Convenience: What can unwary Persons conclude from this Tergiversation and Hypocrisy, but that all Religion is State-Craft and Imposture? That all Godliness is Gain, and that the Doctrines of the Church lie not so much in her Articles, as her Honours and Revenues.'

Here, he said, was a full Charge of False Brotherhood, upon *Persons of Characters and Stations*, and consequently, according to the Description he had given above of False Brethren, *that they did weaken, undermine and betray, &c.* he had charg'd *Men of Characters and Stations*, with *weakening, undermining and betraying, &c.*

835. That if this was not to be understood of Men of Libelling in the highest Characters, as the Dr. would insinuate in his Answer, (and though it were true too) strates, criminal. yet would such an Affirmation be highly criminal; for the meanest Magistrate might not be traduc'd, or libell'd, or the Government on their Accounts.

But if the Words were not restrain'd to the highest Characters, so neither were they to the lowest; and, in Truth, they struck at all, and were so intended, and that it was a general Arraignment of the Government; and, to put the Matter out of Doubt, he observ'd, That the Dr. at Page 26, says, in Scripture Words, *That the Church's Adversaries are Chief.*

As to the two Passages being twelve Pages asunder, he hop'd the Dr. would not pretend to say, that the False Brotherhood he shews the Danger of, and the False Brotherhood he shews the Malignity of,

of, had no Relation to one another, because they were at twelve Pages distance.

As to the third Clause of this Article, viz. *That Dr. Sacheverel charges Her Majesty, and those in Authority under her, with a general Male-Administration*; every part of the Sermon, he said, made out this, but particularly at the 14th Page, there was a very home and direct Charge upon the Government; for, having given a very large Description of False Brethren, with Relation to the State, he adds, *These False Brethren, in our Government, do not singly, in private, spread their Poison, but (what is lamentable to be spoken!) are suffer'd to combine into Bodies, and Seminaries, wherein Atheism, Deism, Tritheism, Socinianism, with all the hellish Principles of Fanaticism, Regicide, and Anarchy, are openly profess'd and taught, to corrupt and debauch the Youth of the Nation, in all parts of it, down to Posterity, to the present Reproach, and future Extirpation of our Laws and Religion.*

That, Page the 23d, a False Brother is represented as *relinquishing his old Friends and Principles, and betraying his own Party, for the little sordid Lucre of Place or Preferment.* And that the False Brethren he mentions, as put into Places, are put in by our Governors, he plainly suggests, Page the 18th, when he bids the Governors consider, whether they are fit to be entrusted, especially with the Guardianship of our Church and Crown.

And he concluded this Head, with that Passage in the Preface to the *Derby* Sermon, where the Dr. says, 'Now, when the Principles and Interests of our Church and Constitution are so shamefully betray'd and run down, it can be no little Comfort to all those who wish their Welfare and Security, to see, that notwithstanding the secret Malice and open Violence they are persecuted with, there are still to be found such worthy Persons of both, who dare own and defend them, as well against the rude and presumptuous Insults of the one Side, as the base undermining Treachery of the other.'

As

As to the first Clause in this Article, viz. That he suggests, *That Her Majesty's Administration, both in Church and State, tends to the Destruction of the Constitution:* This, he said, was made out, from what was said of the other two; for if Men of Characters and Stations, in Church and State, that *betray our Constitution, and encourage and excite others to destroy it,* come into their Places thro' the *Administration,* and if the general *Male-Administration of Her Majesty, and those in Authority under her,* consist, in part, in *preferring and encouraging,* at least, *not discouraging,* those Persons that *betray and destroy the Constitution,* the necessary Consequence was, That all those fatal Mischiefs complain'd of, *arose from the Administration,* which therefore plainly *tended to the Destruction of the Constitution.*

As to the next Clause, *That, as a publick Incendiary, he persuades Her Majesty's Subjects to keep up a Distinction of Factions and Parties, and instils groundless Fears and Jealousies, &c.* He said, What he advanc'd against the Foundation of the present Establishment, was as an Incendiary, and from his Language, *of forsaking old Friends and Principles, and betraying their Party,* what cou'd be the Drift of it, but to keep up Distinctions, and instil groundless Jealousies? And though he seem'd, in Words, to approve of an Indulgence to Consciences truly scrupulous, yet, in reality, he approv'd none, since he admitted not any one to have a Conscience truly scrupulous, who differ'd from him; but all such were False Brethren, and Villains, and to be stigmatiz'd with all the other Names of Reproach, he was so liberal of.

As to his *inciting Her Majesty's Subjects to Arms and Violence,* this, he said, was most manifest: The spreading such hideous Representations of an evil Government, such Outcries of the Church and True Religion being undermin'd, betray'd and expos'd, by those in the Administration, naturally tended to Rebellion: And therefore at Common Law, [2 *Rep. Reports*, p. 89, 90. *Williams's Case*] *To bear the People in Hand, that the King's Government*

To asperse
the King's Ad-
ministration,
was Treason
at Common
Law.

vernment was erroneous, heretical or unjust, whereby the Manner of the Government was arraign'd or impeach'd, was held to be High Treason. And tho' the Dr. in his Answer, says, he was so far from stirring up Her Majesty's Subjects to Arms and Violence, that he had declar'd all Resistance unlawful: It was true, he had declar'd all Resistance to the *Supreme Power* to be unlawful, but he never declar'd all Resistance to *Her Majesty* to be unlawful: Her Majesty's profess'd Enemies also condemn'd *Resistance*, namely, the Resistance that was made against King *James* the Second, which brought about the Revolution, and any Resistance that shou'd be made against the Pretender; and Dr. *Sacheverel* went no further: And supposing the Doctor's Zeal but pretended, for the Queen, and really for another, whom he thought his rightful Prince, then he wou'd be found very consistent with himself: Every Expression, and his whole Proceedure, wou'd be exactly just. 837.

That the last part of this Charge was, his *wresting and perverting divers Texts of Scripture*; and the first Passage he took notice of, was at the 21st Page, where he says, 'When *Elisba*, the great Prophet of God, was surrounded with an Host of Enemies that sought for his Life, his blind Servant beheld not the Peril his Master was in, till his Eyes were opened by a Miracle, and he found himself in the midst of Horses and Chariots of Fire.' He observ'd that the Story in Holy Writ was directly contrary, and it was only the blind Servant fancied they were in Danger, when really they were not; that the Story was in 2 *Kings*, Chap. 6. and it is there said, That the King of *Syria* was at War with *Israel*, and being inform'd that what he said in his Bedchamber was told the King of *Israel* by *Elisba* the Prophet, resolv'd to seize *Elisba*, and hearing he was at *Dothan*, Ver. 14. 'Tis said, *He sent thither Horses and Chariots, and a great Host, and they came by Night and compass'd the City about; and when the Servant of the Man of God was risen early and gone forth, behold an Host compass'd the City both with Horses and Chariots: And his* 839.

Servant

Servant said unto him, Alas, my Master, how shall we do? And he answer'd, Fear not, for they that be with us, are more than they that be with them; And Elisba pray'd and said, Lord, I pray thee open his Eyes that he may see. And the Lord opened the Eyes of the young Man, and he saw, and behold the Mountain was full of Horses and Chariots of Fire.

Now the Doctor's Exposition was, That this Heavenly Guard, these Horses and Chariots of Fire, which were there only to defend the Prophet, were to destroy him, and from them arose the Danger, which the Dr. fancied the miraculous opening the Servant's Eyes disclos'd to him: And whether he shou'd impute this Mistake to the Doctor's Ignorance of the Passage, and taking it upon Hearsay, or to his Resolution knowingly to pervert it, he left to the Doctor's Choice.

That the next place he perverted, was that Passage in the Fourth Chapter of the *Ephesians*, where the Apostle exhorts Christians in their Spiritual Warfare to *put on the whole Armour of God, &c.* The Dr. having mention'd other Powers, in Places and Stations, against whom his Auditors were to contend earnestly; he said, he repeated the Words of the Apostle, not in the Spiritual Sense he us'd them, but as an odious Description of the Government in Scripture Words, and that the Dr. cou'd not defend himself by saying, *That the Arms of Resistance to Princes was no part of the Spiritual Armour recommended by St. Paul*, because he had plainly departed from St. Paul's Spiritual Meaning.

004. And whereas the Dr. in his Answer says, that to his great Comfort he observes, that he is only charg'd in this Article with *suggesting*, (and not maintaining) that Her Majesty's Administration, in Church and State, tends to the Destruction of the Constitution; and hopes that bare Suggestions and Insinuations, shall not involve an *English* Subject, in the Guilt and Punishment of High Crimes and Misdemeanors.

He

He reply'd, That altho' this Charge had not been positive (as it was) it wou'd be very extraordinary to imagine, that let a Man cast never so many Scandals and Reproaches on the Government, if it were done by way of Suggestion and Insinuation, and the Charges not exp'ressly maintain'd and avow'd, that there shou'd be no Crime in it, or not a *high Libel*. one: This was to say that Sedition and exposing the Government was lawful, only the Manner was to be taken care of: That if you do it by Suggestions, which every body will understand, and which will have their full Effect, yet you may be safe, for those who come to judge you, are not to understand you, tho' every Body else does.

That in the Case, *De Libellis famosis*, in the 5th Report, there was a Prosecution for a Libel, translating an Archbishop, who was dead, by Descriptions and Circumlocutions, and not in express Terms, and no Body ever doubted but it was criminal: And where the Queen and Government were concern'd, and all was at Stake, a particular Case ought to be taken of a Man's Expressions, and every one who was truly loyal, and desir'd the Peace of his Country, wou'd do it: And knavish Designers against the Publick Peace, were not to be suffer'd to go on in overthrowing it, because they had contriv'd crafty Ways of doing it. And as to his Lamentation, with which he concludes, *viz. Hard is the Lot of the Ministers of the Gospel, &c.* it was a most insolent Reflection on the Honour and Justice of the House of Commons, and was not inserted in the Doctor's Answer, by way of Defence, but to insinuate, that Dr. Sacheverel had been prosecuted only for doing his Duty, as a Clergyman.

But was the Story of *Elisha*, as told by him, an honest Citation? were the *Enemies* that were *Chief*, and the Adversaries that at *present* prosper, no particular Persons now in being? was this Sermon an Exhortation to Piety and Virtues? Or, was it not manifestly a Trumpet to Rebellion, an exposing the Faults of his Governots, to make their Persons hated?

The Commons, he said, had the greatest Veneration for the Clergy of the Church of *England*, who were glorious thro' the whole Christian World, for their preaching and writing, and their Steadiness to the Protestant Religion, in the utmost Danger; and it was with Regret and Trouble, that they found themselves oblig'd to bring before their Lordships Bar one of that Order. But when they consider'd Dr. *Sacheverel* divesting himself of all the becoming Qualities proper for his Order, of all that peaceful, charitable Temper, Christianity requires, and with Rancour and Malice branding all who differ'd from him (tho' thro' Ignorance) with the Titles of Hypocrites, Rebels, Traitors, Devils, reviling and exposing them, conducting them to Hell, and leaving them there, &c. And doing this at a Time when all *Europe* was in War, and nothing cou'd preserve us from falling into the Hands of the Grand Enemy and Oppressor, but our Unanimity: That he shou'd then labour to sap the Establishment, railing and declaiming against the Government, crying, To Arms, and blowing a Trumpet in *Sion*, to engage his Country in Seditions and Tumults, and overthrow the best Constitution, and betray the best Queen that ever made a People happy; and this with Scripture in his Mouth: The Commons look'd upon it, that he had sever'd himself from the rest of the Clergy, and were in no Fear of being thought Discouragers of those who preach Virtue and Piety, because they prosecuted him who preach'd Sedition and Rebellion: Or to have any Design to lessen the Respect and Honour that's due to the Clergy, by bringing him to Punishment, who disgrac'd the Order.

Mr. Secretary Boyle's Argument, in Maintenance of the fourth Article.

Mr. Secret. *Boyle* being appointed to assist in maintaining the fourth Article, he said, He was persuaded, that whoever went about to asperse and vilify the late Revolution, wou'd rejoice to see another.

That the whole Scope and Design of the Sermon was to instil groundless Jealousies into the Minds of the People, and to cast the most virulent Reflections upon Her Majesty's Administration, and that

one

one wou'd think, by this Discourse, the Church was now suffering under the severest Persecution.

That the Dr. did indeed affect, in his Answer, and in one part of his Sermon, to profess great Duty to Her Majesty, but if those Expressions were compar'd with the Calumnies he had heap'd on her Administration, they wou'd not mitigate his Crime, or avail him any more than the Pretence he made, of being for Liberty of Conscience would, when he condemn'd the Toleration.

And he observ'd, That it was no new Thing among those who design'd to stir up Sedition, to bestow great Encomiums on the Person of the Prince, the same Method, he said, was pursued in the late unhappy Times; and the Incendiaries of those Days pretended, that *the Protestant Religion* was in Danger, as the Enemies of the Constitution now cried out, *The Church was in Danger*. But every thing, he said, was in Danger, from such seditious Discourses, for who cou'd sit still, if they were persuaded, that *the Altars and Sacraments of our Church were prostituted to Hypocrites, Deists, Socinians and Atheists, and this done with Impunity, and without Discouragement?* What cou'd more provoke all good Christians, than to be told, *That People are suffer'd to combine into Bodies, and Seminaries, wherein Atheism, Deism, Trithieism, Socinianism, with all the hellish Principles of Fanaticism, Regicide and Anarchy, were openly profess'd and taught.*

And no Man cou'd think he shou'd long enjoy his Religion, Liberty, or Property, if he cou'd be made to believe, *That the Foundations of the Church were undermin'd, and the Government endanger'd, by filling it with its profess'd Enemies.* Therefore he submitted it to their Lordships, Whether the Sermon was not seditious, and whether the Prisoner at the Bar was not guilty of High Crimes and Misdemeanors?

Mr. Chancellor of the *Exchequer*, being also appointed to assist in maintaining the fourth Article, he said, He cou'd not but take Notice, that in a Sermon preach'd on a Day appointed to commemorate

842.
Mr. Chancellor of the *Exchequer's* Argument, in Maintenance of the fourth rate Article.

rate the Blessings we enjoy'd by the late happy Revolution, there was no Notice taken of the Dangers we were in before it, or any thing said in Order to raise the Devotion of the People, and their Thanks to God, for their Deliverance, but the whole Tenor of the Discourse was to show the Male-Administration of the Government, and the Dangers that had been coming upon the Church, ever since the Revolution.

He observ'd, That the Dr. was not only warm in preaching the Sermon, but in his Dedication, he show'd with what Spirit he compos'd it, where he says, *If honest Gentlemen wou'd sit still, and give up their Cause, for want of Courage, or a just Sense of the dangerous Attempts of our Enemies, without the Spirit of Prophecy we may foretel what will become of our Constitution, when it is so vigorously attack'd from without, and so lazily defended from within.*

He said he desir'd to know who the Dr. took to be the Defender of the Faith, and who, under that Defender, was to protect the Church? And whether this must not necessarily be meant as a Reflection on Her Majesty, and upon those that, under her Authority, were to take care of the Church.

He said, There were some People, and he wish'd their Numbers did not encrease, who wou'd not allow the Church to be out of Danger, while the Civil Magistrate had the Government of the Church. They cancel'd the Queen's Supremacy, and deny'd the Authority of the Laws, and erected a Church independent of the Civil Government, and of this Church he took the Dr. to be; and in this Church the Dr. might properly thunder out his Bulls and Anathema's: Here was a Field for him to open his Commission, where he might sound his Trumpet, and not preach Peace.

And tho' the Commons cou'd never admit the Church establish'd by Law to be in Danger under Her Majesty's Administration, yet as to their independent Church, he hop'd it wou'd ever be in Danger, and he cou'd not but think that *whole some Severities* were very proper to be apply'd to the

Broachers

Broachers of such seditious Doctrines: They were Popish Principles, and if they shou'd obtain here, wou'd certainly bring in Popery along with them.

He said, they were not for restraining the Ministers of the Gospel (as the Dr. unjustly insinuated) from doing their Duty, in recommending Piety and Virtue: But when a Clergyman shou'd, instead of reprov'g Vice and Immorality, take upon him to reproach the Government, and, instead of preaching Peace and Charity, and other Moral Virtues, take upon him to raise Jealousies, foment Divisions, and stir up Sedition, with which they charg'd Dr. *Sacheverel*, it was high time to put a stop to it; and he thought they had made good their Charge, and they cou'd not doubt their Lordships Justice on the Offender. 843:

Then the Lords adjourn'd to their House above.

Fourth Day. *Thursday*, the 2d of *March*.

The Court being sate, and the usual Proclamations made,

Mr. *Lechmere* said, The Commons had gone through their Charge, and acknowledg'd they had been heard with great Candour and Patience: And he thought he had good Grounds to say, That their Impeachment had been made good in every part of it: That in opening the Charge they consider'd the Dr. in the Condition of a Person accus'd; but the Proofs having been produc'd, and the Evidence rendred unquestionable, the false Colours of his Discourse taken off, and his Scheme reduc'd to its true Consistency, he desir'd Leave to represent him to their Lordships in a true Light, and in his proper Colours.

He said, Their Lordships saw this Gentleman under the Reign of the greatest and best of Princes: Under an Establishment excellently contriv'd, and adapted, to answer all the good Ends of Government: (A Constitution which happily recover'd it self, at the Restoration, from the Confusions and Disorders which the horrid and detestable Proceedings of Faction and Usurpation had thrown it into, and which,

844. after many Convulsions and Struggles, was providentially saved at the late happy Revolution:) They saw him at a Time when the Church of *England* was in perfect Prosperity and Safety at home, and in the highest Reputation abroad, and when the Nation enjoy'd all the good Effects of a prudent and successful Administration; in the most solemn and publick Manner, levelling the most virulent Discourse against Her Majesty's Title to the Crown, and against our present Establishment, and calculated to favour the Pretension of another; they found him reviving and avowing the same Principles as were advanc'd in a late Reign, by the profess'd Instruments of Popery and Arbitrary Power, and applying them in Condemnation of the glorious Work of the late happy Revolution: That they found him arraigning the Honour of Her Majesty and her Parliament, aspersing her Administration, stirring up Sedition, and exhorting to Rebellion, and that in the Name of Almighty God, as a Person commission'd from Heaven to that End, and in the most prophane Manner abusing and wresting Scripture to those impious Purposes.

'Twas on these Grounds the Commons had charg'd the Crimes committed by him to have been done with an Intent to *undermine Her Majesty's Government, and to stir up Arms and Violence*; and if there wanted further Evidence, they might remind their Lordships of the Rebellion and High Treason committed the last Night, by those who abetted the Prisoner.

He said, The Commons conceiv'd they had Reason to take great Satisfaction from this Proceeding, whereby they had an Opportunity, in the most solemn Manner to assert the Freedom and Excellence of the present Establishment, and that it must bring much Comfort and Peace to all Her Majesty's faithful Subjects, to see her undoubted Title, the Wisdom of her Administration, and the Protestant Succession, effectually supported by their Lordships Judgment.

He added, That the Commons had gone thro' their Charge together, that their Lordships might have

have it entire; and they did reserve to themselves the Liberty of Replying, and of every other legal Advantage that shou'd arise to them in the Progress of their Impeachment.

Then the Lord Chancellor acquainted the Doctor's Council they might proceed in his Defence; but Sir *Simon Harcourt* intimating that it was late, and that they thought it of great Importance to go thro' the first Article at once, the Lords adjourn'd to their House above. 845.

Fifth Day. *Friday*, the 3d of *March*.

The Court being sate, and the Doctor's Council directed to proceed in his Defence.

Sir *Simon Harcourt* said, As to that part of the first Article, which charged the Dr. with suggesting and maintaining, *That the necessary Means us'd to bring about the late happy Revolution, were odious and unjustifiable*: Tho' these *necessary Means* had been explain'd by the Managers, to be the *Subjects Resistance to their unfortunate Prince at the Revolution*, yet of this Resistance the Dr. had made no Mention in his Sermon: He had indeed affirm'd the utter Illegality of Resistance to the Supreme Power, on any Pretence whatsoever, but it cou'd not be pretended, there was any such Resistance us'd at the Revolution, for the supreme Power was the Legislative Power, which was not then resisted, the Revolution taking Effect by the Lords and Commons concurring and assisting in it.

He observ'd also, That it had been asserted by one of the Managers, That tho' the Dr. expressly mention'd the Supreme Power, which was the Legislative, yet he certainly *intended* the Supreme Executive Power, and therefore concluded him guilty of this Charge; and it had been mention'd as an Argument of great Lenity, that the Dr. was not proceeded against for High Treason, as a Parson in one of the late Reigns was, for Words said to be less offensive and dangerous; and the Managers added, That had a Dissenter (whose Affection to the Government was unsuspected) express'd himself as the Dr. did, the Commons shou'd not have prosecuted

him. To this Sir *Simon* said, The Case alluded to, he suppos'd, was, Mr. *Rosewel's*, a Nonconformist Minister, who was indicted of High Treason, for Words deliver'd in a Meeting-House: But 'twas a Prosecution carried on thro' the Violence of those Times, and generally detested: And tho' he was Convicted, yet upon cooler Thoughts, and considering the Uncertainty of the Expressions, Judgment was arrested, and Mr. *Rosewel* discharg'd.

And he took notice, that another learned Gentleman had urg'd, That the Dr. had the Pretender in his View, in Order to avoid that strange Inconsistency, in concluding that the Dr. was endeavouring to undermine the Government, by preaching up the utter Illegality of resisting it.

846. But Sir *Simon* said, That the Law of *England* was more merciful than to make any Man a Criminal, by constraining his Words against the natural Import of them, in the worst Sense; and that some Persons were entitled to have a more favourable Construction put on all their Words and Actions, than others, particularly Magistrates; and it was much more reasonable that Ministers of the Gospel, who had their Commission from God, and spoke in the Name of God, shou'd have the most candid Interpretation made of what they said.

That it was a miserable Case, when the Dr. had taken the Abjuration-Oath, and done the utmost that was required of him, he shou'd still be told, Tho' he had abjur'd the Pretender, he had not yet forgot him; and that neither his Words or Oaths cou'd give any Satisfaction.

But if the Manner of this solemn Prosecution had not alter'd the Nature of Things, he hoped he might insist, (without putting in a Claim of Right in the Behalf of all the factious and seditious People of *England*, to revile the Government at Pleasure) That by the happy Constitution under which we live, a Subject of *England* was not to be made criminal by a labour'd Construction of doubtful Words, or, when that wou'd not serve, by resorting to his Meaning; too many Instances whereof there were before the Revolution, (but that had put an
End,

End, he hop'd, to such Arbitrary Construtions :) And he cited Sir Samuel Bernardiston's Case, which came before their Lordships on a Writ of Error, immediately after the Revolution; where the following Reasons for reversing that Judgment were incerted in their Lordships Journal, viz. 1st, *The Forc'd Con-*
Information in this Case being groundd upon structions not
Letters, which in themselves were not criminal, to be admit-
but made so by Inuendo's, it is declar'd, That Inu-
endo's, or suppos'd or forc'd Construtions, ought
not to be allow'd; for all Accusations shou'd be
plain, and the Crimes ascertain'd. 2dly, *That Fines ought*
the Fine of Ten thousand Pounds was exorbitant be with a Sal-
and excessive, and not warranted by legal Prece- no Contenemen-
dent in former Ages, for all Fines ought to be to.
with a Salvo Contenemento, and not to be the
Party's Ruin. That these were their Lordships Declarations in that Case, and if there was any Doubt or Uncertainty in the Doctor's Expressions, he hop'd they wou'd put the most favourable Constrution on them.

But he said he observ'd, That the main Objection, was, That the Doctor's Assertion of the *Illegality of Resistance*, must necessarily be understood of the *Executive Power*. And if it be utterly illegal to resist in any Case, then it was so at the Revolution, and from thence the Consequence was drawn, *That the Dr. was guilty of maintaining, That the necessary Means us'd to bring about the Revolution, were odious and unjustifiable.*

But whether the Expression was understood of the Legislative or Executive Power, he said he hop'd he shou'd be able to satisfy even the Gentlemen of the House of Commons, that the Doctor was an innocent Man notwithstanding that Assertion.

And, first, he insisted, That the Dr. had not 847:
 in any part of his Sermon, apply'd this general Assertion to the Revolution: And held, That 'twas one thing, expressly to affirm the Revolution, was such a Case as ought not to be exempted out of the general Rule; and another thing not to make the Exception.

He said he apprehended that extraordinary Cases, Cases of Necessity, are always implied, tho' not express'd, in the general Rule. That the general Rule ought always to be press'd, but the Exceptions were never to be particularly stated. To point out every such Case beforehand, was as impossible, as it was for a Man in his Senses not to perceive plainly when such a Case happens.

That the same Apostle who enjoins Obedience and Non-Resistance to the Higher Powers, commands also Servants to obey their Masters, and Children their Parents, in all Things; notwithstanding which general Precepts, many Cases might happen, wherein it might not be only unfit, but sinful, for Servants to obey their Masters, or Children their Parents; and yet the Apostle never thought it proper to state or mention those Cases, but contented himself to press the Duty of Subjection in general, leaving such Cases (when they happen'd) to justify themselves.

848. Non-Resistance the Doctrine of the Church of England, and agreeable to the Laws.

That the Doctor's Assertion, of *The Illegality of Resistance to the Supreme Power, on any Pretence whatsoever*, in general Terms, without expressing any Exception, was warranted also by the Authority of the Church of England, and was agreeable to the Laws of England. That in the Homilies, the Duty of Subjects was press'd in much stronger Terms than the Dr. had press'd it, without any Limitation or Exception: That by the Thirty-nine Articles the Homilies were declar'd to contain a godly and wholesome Doctrine, and were order'd to be read in Churches diligently and distinctly, that they might be understood by the People: That the Thirty-nine Articles were confirm'd by Act of Parliament [the 13 Eliz. c. 12.] and every one who was admitted into Orders, or to a Benefice with Cure, was requir'd to subscribe and read them, and declar'd his unfeigned Assent thereto.

That by the Act of Union a perpetual Sanction was given to the Books of Homilies, by inserting the 13th of Eliz. which confirms the Thirty-nine Articles, by the Thirty-fifth of which, the Doctrine of the Church taught in the Homilies, was

ap-

approv'd, and the 13th of *Eliz.* is declar'd to be an essential and fundamental Part of the Union.

And was it Criminal for a Man to preach that Doctrine which 'twas his Duty to read? Nor did this Doctrine, he said, die at the Revolution, as was plain by the Office appointed for the Fifth of *November*, where the Clergy are directed, if there be no Sermon on that Day, to read one of these Homilies against Rebellion, and since the Dr. chose to preach on that Day, he cou'd not, he thought, better comply with the Command of her late Majesty, than by preaching the same Doctrine as was contain'd in those Homilies he was commanded to read on that Day, if he did not preach.

And as a further Proof that this Doctrine of Non-Resistance, as laid down by the Dr. in general Terms, without making any Exception, was the Doctrine of the Church of *England*, he said, They cou'd produce numberless Authorities, and shou'd beg leave to lay before their Lordships some Passages out of the learned Writings of nine Archbishops, and above twenty Bishops, and of several other very learned Men.

And that it might not be thought this Doctrine died at the Revolution, they shou'd lay before their Lordships the Opinions of several Bishops and Archbishops since, and it was strange, that the same Words coming out of their Mouths, shou'd be receiv'd as Oracles of Truth, and when spoke by the Dr. shou'd be made the Ground of an Impeachment: And if an intemperate Expression of one single Archbishop, dead a hundred Years since, was fit to be inserted in an Impeachment, what Punishment shou'd he deserve, cou'd he suppose the Doctrine taught by so many Archbishops and Bishops to be erroneous.

That had this *Slavish Doctrine* of Non-Resistance been first branded with its *indelible Mark of Infamy*, and the *Right and indispensable Duty of Resistance to Princes* plainly shewn: Had all the slavish Notions of the Common Law, dispers'd in our Law-books, which give Countenance to this Doctrine of Non-Resistance, been first weeded out, and some

few Acts of Parliament, entirely agreeable with this *Slavish Doctrine*, first repeal'd, had the People been set right in the Notions of their Obedience, and the Ministers of the Gospel instructed by Act of Parliament, what Doctrine they ought to preach, and what not, and the Dr. had afterwards err'd, their Lordships might then have look'd upon him as an obstinate Offender.

850. Then he proceeded to shew, that this Doctrine of the *Illegality of Resistance on any Pretence whatsoever*, was the Doctrine of the Church, so it had always been declar'd by the Legislature, without making any particular Exception. And whatever

Measures, in Cases of the last Necessity, may have been taken by the People, to preserve their Liberty, &c. yet in no Age cou'd any Instance be given, no, not in the Reigns of those Princes who had been depos'd, that this Doctrine, of the *Right of Resistance*, was ever permitted to be asserted by any particular Persons: And a memorable Case to this Purpose, he observ'd, happened in the Reign of King *Edward* the Second, when an Act of Parliament pass'd for the Banishment of the two *Spencers*, which recites, 'That they had affirm'd and

The Treason of the *Spencers*, that the King might be depos'd for Male-Administration. 'publish'd in Writing, That Homage and Allegiance was due more by Reason of the Crown, than by Reason of the Person of the King, and that if the King did not demean himself according to Reason, in the Exercise of his Government, his Subjects might remove him; and that since that Removal cou'd not be by Course of Law, they might therefore remove him by Force.

Condemn'd by two Acts of the King depos'd, it was reviv'd again in the Reign of *Edw. I.* his Successor, and was at this Day untouched: And what the Opinion of our great Lawyers had been since, might be gather'd from *7 Co. Calvin's Case*, where my Lord *Coke* styles this Opinion of the *Spencers* a *damn'd Opinion*.

He said he mention'd these Acts to show, that however applicable the Case of the Revolution might be to that of King *Edward* the Second, yet those very Persons by whom the King was depos'd, thought

thought it a High Crime in the two *Spencers* to take upon them to publish such Positions.

By the 25 of *Edw. 3. Levying War against the* Several Acts *King in his Realm*, is declar'd in general Terms to cited, which be *High Treason*, without any Exception: By the declare the Il-
Oath of Allegiance 3 *Jac. 1. c. 4.* all Persons were legality of Re-
to swear to defend the King to the utmost of their sistance in any
Power, against all Conspiracies and Attempts Case.
whatsoever, which shall or may be made against
his Person, Crown, or Dignity. By the Act of the
12 *Car. 2. c. 30.* for Attainder of the Regicides, it
is declar'd, *That by the undoubted and fundamen-*
tal Laws of this Kingdom, neither the Peers of
this Realm, nor the Commons, nor both together,
in Parliament, or out of Parliament, nor the
People, collectively or representatively, nor any
other Persons whatsoever, ever had, have, hath,
or ought to have, any coercive Power over the
Kings of this Realm. And he desir'd their Lord-
ships would please to consider, if the Doctor's As-
sertion concerning Resistance had outgone the Decla-
ration in this Law.

In the Militia Act also, the 13 and 14 *Car. 2. c. 3.*
it is declar'd, *That neither both or either of the*
Houses of Parliament, can, or lawfully may, raise
or levy any War, offensive or defensive, against His
Majesty, his Heirs or lawful Successors: And here
was no Manner of Exception neither. And cou'd
it be a High Crime and Misdemeanor, he demand-
ed, after this, to assert, in general Terms, *That*
Resistance to our Prince was unlawful?

By the Corporation Act, 13 *Car. 2. Sess. 2. c. 1.* 851.
all Officers in Corporations are required to swear,
That it is not lawful, upon any Pretence whatso-
ever, to take Arms against the King. By the
Act of Uniformity, 13 and 14 *Car. 2. c. 4.* all Ec-
clesiastical Persons, and many others, are requir'd
to subscribe the Truth of that Assertion, *That it is*
not lawful, on any Pretence whatsoever, to take
Arms against the King.

And as to that Objection, *That by the 2 W. and*
M. The Oath enjoin'd to be taken by the said sever-
al Acts, was not to be requir'd from thenceforth,
and

and that the former A&ts, *as to that Oath*, were repeal'd.

He answer'd, It was a very tender Repeal, if it were one; but however the Proposition was nevertheless true, because it was not sworn: If it was true when it was sworn, the Proposition was equally true before and after; and since that Oath had been taken by so many of the Peers and Commons, no Man wou'd pretend to question the Truth of the Proposition.

Whether the Dr. had not been more obnoxious, if he had made an Exception to the general Rule?

And Dr. *Sacheverel*, he said, being impeach'd for not making an Exception to the general Rule, he begg'd leave to turn the Case, and suppose he had made it: Had he been picking Holes for the Subject to creep out of his Allegiance, on a Day when he was enjoin'd to preach or read a Homily against Rebellion, in which there was no Exception, might not his Diocefan have question'd, by what Authority he presum'd to preach in that Manner? Might he not have been told, that it was his Duty, in Imitation of the Apostles and the Fathers of our Church, to press the general Duty of Obedience, and the Illegality of Resistance, without making any Exception whatsoever? That had he been question'd by the Temporal Power, for preaching in the Manner he has done, and an Indictment had been fram'd against him on this general Assertion; he apprehended, that not one of the twelve Judges would have declar'd he went too far. But had he been making Exceptions to the general Rule of Obedience, might he not have been told, 'Twas easy to discern what Spirit he was of, of what Party he was, and what he aim'd at; that he had not been preaching in Defence of the late Revolution, but under Pretence of justifying one Revolution, he was labouring to bring about another. He knew how far the Design had gone of Landing the Pretender, but two Years since; what else cou'd he mean by picking Holes in the Rules of our Obedience?

As to that part of the Charge, *That his late Majesty, in his Declaration, disclaim'd the least Imputation of Resistance*, he thought, tho' the Dr. had

had spoken improperly, yet he had spoken innocently. The Managers said, By Resistance, they meant the Resistance of the Subjects to their Sovereign; but the Resistance the Dr. mentions his late Majesty to have disclaim'd, cou'd have no such Meaning, for he was a Sovereign Prince, and might resist whom he pleas'd; and besides, the Dr. had in the Body of his Sermon, as well as in a Marginal Note, shewn that he meant Conquest, by Resistance in that Place. And by the Journals of both Houses, The Two it appear'd, they had resolv'd, That the asserting Houses censure of Dr. King *William* and *Queen Mary* were King and Queen by Conquest, was injurious to their Majesties *Burnet's Position*, That K. *William's Title* rightful Title to the Crown, and inconsistent with *was Conquest*, the Principles on which this Government was founded, and tended to the Subversion of the Rights of the People.

As to the last part of this Article, *That to impute Resistance to the Revolution, was to cast black and odious Colours on his late Majesty, and the said Revolution*: He said, the Words *casting black and odious Colours*, were so far from referring to his late Majesty's *disclaiming the Imputation of Resistance*, that they conclude the Sentence which went before it, in which the Dr. mentions, *New Preachers, and new Teachers, that broach'd abominable Positions, That the People have a Right to cancel their Allegiance at Pleasure, to call their Sovereign to Account, and who pretend to justify the horrid Murder of the Royal Martyr King Charles the First, and endeavour to screen themselves, and their vile Notions, under the Revolution*. The Dr. having mention'd these new Preachers, and their Doctrine, goes on, *Our Adversaries think they effectually stop our Mouths, and have us sure and unanswerable upon this Point, when they urge the Revolution of this Day in their Defence; but certainly they are the greatest Enemies of that, and his late Majesty, and the most ungrateful for the Deliverance, who endeavour to cast such black and odious Colours upon both*.

He desir'd their Lordships to consider, what this refer'd to, and whether it did not clear the Revolution

lution against the Venom of those Miscreants, who publish'd such Villanous Assertions as these.

And whereas it had been objected by a Manager, That a Minister had nothing to do to meddle with these Things, and if any Man had offended against the Temporal or Ecclesiastical Laws, the Courts were open, the Magistrates were to punish. He said, If this Doctrine held, he must not preach against any thing; for all the Offences against the Ten Commandments might be prosecuted, either in the Temporal or Ecclesiastical Courts: And if it were doubted, whether there were any such Men, who endeavour'd to justify the Murder of King *Charles*, or defend it by the Revolution, they shou'd show there were too many Instances of such Persons, who run most vile Comparisons between the Revolution and the most execrable Murder of King *Charles*, and cou'd find no other Difference between them, than that abominable Distinction, of a *wet Martyrdom*, and a *dry one*.

Mr. Dodd's Argument in Defence of the Dr. upon the first Article. Mr. Dodd being likewise of Council for Dr. *Sa- cheverel*, he said, That by the same Arguments as had been us'd to maintain these Articles, any Book, or Sermon, were it never so innocent, might be represented as a Libel.

One ought not to be stil'd, a Criminal, till he is Convicted. That the Gentlemen Managers scarce any three of them agreed in any principal Point, except in this, That the Dr. was a *Criminal*, before he was Condemn'd: That the usual Expression, during the whole Debate, had been, *The Criminal at the Bar*: Which was not usual in other Places, and wou'd have been a great Discouragement to his Council, but that they consider'd the Judgment was their Lordships, and by their Justice they must stand or fall.

That they were charg'd sometimes with having said too much, sometimes too little, and sometimes for not mentioning Things that were the proper Subject of the Day; but this was objected, for want of observing the Sermon, for as it was preach'd on the 5th of *November*, their Lordships wou'd find a whole Leaf together, setting forth the horrible Design of the Powder-Plot; and both in the Body and

and Conclusion of the Sermon, Notice was taken of our Deliverance on that Day.

As to the Act of the 25 Hen. 8. about the Supremacy, which the Managers had cited, he did not apprehend it to be to the Purpose; for it only asserted the Independency of the Crown, in Respect to the Papal Usurpations; and King Henry the Eighth was a Prince that wou'd as little bear the Doctrine of Resistance, as any Sovereign that had worn the Crown.

He said, They were hearty Well-wishers to the Revolution, and agreed, That the Law of the Land was the Measure of the Prince's Authority, and the Peoples Rights; and that Necessity did induce the Peoples Resistance at the Revolution, and justify 'em in it: But they deny'd that the Doctrine of Non-Resistance, as laid down by the Dr. was intended for the Pretender, or cou'd be construed a thwarting the Revolution.

He said, the Dr. as a dutiful Subject, took Notice, that Her Majesty was the last of the lineal Descent, and the Relict of the Royal Family, by which he disown'd the Pretender, and his Right, who cou'd have no Pretensions, but as a Descendant of that Family; and this was enough to acquit the Dr. of *having an Eye to one on t'other side the Water.*

As to the Act call'd, *The Bill of Rights*, cited by the Managers, it did not meddle with the Points of Resistance, or Non-Resistance; but the whole Ground and Tendor of that Act was upon the Abdic-
cation: It says, Whereas the late King James having abdicated the Government, and the Throne being thereby vacant, &c. There is no other Fact stated; no Mention of Resistance. And the next Head in that Act, says, *That King James having abdicated the Government, and Their Majesties having accepted the Crown, did become lawful King and Queen, &c.* And these were the only Passages in that Act, as to this Matter.

Mr. Dodd admits the Resistance at the Revolution was justifiable.

King William accepts of the Crown from the Convention, who declar'd that King James abdicated the Government.

As to the Act, *For preventing Vexatious Suits against such as acted in Order to the bringing in Their Majesties*, this was no more than was enacted in

in the Reign of *Edw.* the Third, after *Edward* the Second was depos'd. It was a meer Act of Indemnity, an Act of Pardon for Officers, Civil and Military, exempting those from Prosecution, who assisted in the Revolution, and might have committed any Trespass against their Fellow Subjects on that Occasion.

And he did not see any thing in that Act, *For paying the Dutch 600000 l. for the Assistance they gave His Majesty, at his coming over, that affected this Matter.*

As to the first part of the first Article, *viz. That he suggests, That the necessary Means used to bring about the Revolution, were odious and unjustifiable*; he thought they cou'd not give a better Answer, than utterly to deny they had made any such Assertion. And as it cou'd not be provid out of this Sermon, so neither out of any other Action of his Life, or any other Sermon preach'd by him: But on the contrary, he had endeavour'd to clear the Revolution, and his late Majesty, from the black and odious Colours, which their greatest Enemies had endeavour'd to cast upon them, as wou'd appear by the several Paragraphs of the Sermon compar'd together.

As to his late Majesty's disclaiming the Imputation of Resistance, it was true, if they took it in the Doctor's Sense, *viz.* Such a Resistance as tended to Conquest, and it cou'd have no other Meaning, if that part of the Sermon was read with any Candor and Ingenuity, especially if any Regard was to be had to his own Quotation, where he refer'd to King *William's* Declaration to justify him in that Matter.

And for the next Head, *viz. That to impute Resistance to the said Revolution, was to cast black and odious Colours upon his late Majesty and the said Revolution*; this they likewise utterly deny'd to have maintain'd; they did acknowledge, indeed, he had asserted, *Absolute Obedience, in all Things lawful, to the Supreme Power, and the utter Illegality of Resistance of the Supreme Power, upon any Pretence whatsoever.* And this being the Article

ticle (if they understood the Managers right) on which the whole Impeachment turn'd, he said they shou'd take Occasion to enlarge upon that Point; he admitted, That they did assert *Non-Resistance* in general, as a Rule, tho' there was an Exception implied in that Rule; and such a Case was the Revolution, which was founded on the utmost Necessity, but this Exception (tho' it were implied) was not express'd, stated, or determin'd, by any Law, or Act of Parliament, in being, and consequently it did not become the Dr. to make the Exception: That this general Doctrine was agreeable to the Scriptures, and taught by the Church of *England*: That it had been preach'd before Her Majesty, Their Lordships, and the Commons, on the most solemn Occasions, in stronger Terms than the Dr. had preach'd it, and Both Houses had return'd their Thanks to the Bishops and Clergy who preach'd it, and therefore they cou'd not apprehend themselves to be worthy of such a Reprehension.

He said it was also agreeable to the Laws and Statutes of the Realm: And, having cited those Acts mention'd by Sir *Simon Harcourt*, he also refer'd to the Acts which establish the Abjuration-Oath, whereby *all Persons in Office are to swear to defend the Prince to the uttermost of their Power, against all Traiterous Conspiracies and Attempts whatsoever, which shou'd be made against her Person, Crown, or Dignity.* And *Resistance*, he said, was not the Way to Defend: However, he observ'd that the Dr. said no more, than that it was not lawful to resist the *Supreme Power*, which was the Queen and Parliament; and it had not been said by any, that it was lawful to resist them; and here, he said, there certainly ought to be a standing Obedience, otherwise they must set up the People to be Judges.

That it wou'd be wise Work, if the Exceptions to this stated Rule were to be made by every one that comes into the Pulpit: He conceiv'd it wou'd be an Offence in a Preacher to do it; he must preach the general Proposition, in the Words the Laws of

856. God and the Land had deliver'd it in, and was not to find Meanings to help the People to distinguish themselves out of their Allegiance. And he said it was a great Misfortune to the Dr. to be represented as preaching this Doctrine for the sake of the Pretender, when there was not a Syllable of Proof of it, but, on the contrary, he had disclaim'd all Right in the Pretender, and given all the Security of his Allegiance and Loyalty to the Queen, that the Government requir'd, and in several Places in this Sermon had pray'd, and express'd his Zeal for Her Majesty, and the Constitution in Church and State; and he thought it very hard, and not to be endur'd, that Words shou'd be pick'd up from distant Places, and join'd together to make Sentences, and then Arguments fram'd, and Conclusions drawn from those Sentences, to make good an Impeachment; this, he thought, was not a right Way of Reasoning, or a proper Evidence, and they hop'd therefore, that their Lordships wou'd acquit the Dr. of this Article.

Mr. Phipps's Argument for *Sacheverel*, he said, That they did agree with the Dr. on the first Article. Mr. Phipps being also assign'd of Council to Dr. *Sacheverel*, he said, That they did agree with the Managers, that the Prince of *Orange* did with an Armed Force undertake a glorious Enterprize, for delivering the Kingdom from Popery and Slavery, and that divers Subjects, well-affected to their Country, assisted him in that Enterprize; which being crown'd with Success, the late happy Revolution took Effect, and the Consequences of it were, the Enjoyment of our Religion and Laws, &c. But they denied these Sermons were preach'd with a malicious and seditious Intention, to undermine the Government and Protestant Succession, to defame Her Majesty's Administration, and to asperse the Memory of his late Majesty, and the Revolution, &c.

That to make the Dr. a Criminal within these Articles, every Branch of the Articles ought to be prov'd as they were laid. And it must be prov'd, that he preach'd and publish'd these Sermons with such wicked, malicious, and seditious Intention as is alledg'd in the Preamble, and the Proof ought to be

be plain and positive. Men were not to be harangu'd out of their Lives, Liberties, or Estates; the Laws had so guarded the Persons and Properties of the Subjects, that they were not to be subjected to Forfeiture or Restraint, upon uncertain and conjectural Evidence, by strain'd and unnatural Inferences, Insinuations or Inuendo's.

But before he apply'd himself to speak to any particular Article, he said he must observe what had been urg'd and insinuated, by almost every one of the Managers, in the enforcing every Article, tho' it had not been made any part of the Charge, and that was, *That notwithstanding the Doctor's Expressions of Loyalty to the Queen, yet his Intention was to bring in the Pretender*; for it was said the Dr. confin'd his Doctrine of Passive-Obedience and Non-Resistance to a *Jure Divino*, King or Queen, and from thence it was easy to understand against what Queen the Dr. excited the People to take up Arms. 857.

Now if the Queen, who had an Hereditary Right, and also a Right establish'd by Act of Parliament, cou'd not be said to be a *Jure Divino* Queen, he did not know who cou'd: And he submitted it to their Lordship's Judgment, Whether the denying the Hereditary Right of the Queen, was not to suppose an Hereditary Right in some body else, and whether that did not leave a Way open to bring in that Person in whom the Hereditary Right was suppos'd.

He observ'd, That the Gentlemen who spoke to the first Article, affirm'd, That the Dr. had asserted an unlimited Obedience, due to the Supreme Executive Power (which was the Queen) and this, they said, was a Reflection on the Revolution; but a learned Gentleman, who spoke to the fourth Article objected, That tho' the Dr. had asserted the utter Illegality of Resistance to the Supreme Power, yet he had no where asserted the Illegality of Resisting the Queen, thereby leaving himself at Liberty to resist the Queen, and bring in the Pretender.

That both these Constructions cou'd not be right, but thus much might be interr'd from hence, That the Construction of that Sentence must be very doubtful, in which such learned Men differ'd, and consequently cou'd not be a Charge certain enough to ground a Conviction for High Crimes and Misdemeanors.

As to the first Branch of the first Article, viz. That the Dr. *suggests and maintains, That the necessary Means us'd to bring about the Revolution, were odious and unjustifiable*; he said he cou'd no more find that Sentence in the Sermon, than one of the learned Managers cou'd find a Text of Scripture, quoted by the Dr. in his Bible: And tho' it was said there were Words tantamount, and so this Branch was to be prov'd by Inuendo's, yet they had not shewn what those Words were, and they deny'd there were any such Words.

And as to that part of this Article, which charges, That he *does suggest and maintain, That to impute Resistance to the Revolution, is to cast black and odious Colours on the Revolution*. To make
859. out this, he observ'd, The Words of the Sermon had been transpos'd; and what he had said was really no more than this, That to justify the calling their Sovereign to Account, and the dethroning and murdering him, *by the Revolution*, was to cast black and odious Colours on his late Majesty and the Revolution.

That it was not the Revolution in 1688, but the Revolution in 1648, he endeavour'd to blacken, and the Principles by which that was brought to pass: Those Principles that induc'd Rebellious Subjects to take up Arms against the best Prince that ever sway'd the Sceptre of this Kingdom: Those Principles which brought that pious Martyr to the Block, banish'd the Royal Family, and set a Usurper on the Throne: That the Dr. was so far from reflecting on the Revolution, that he vindicated it in the highest Degree, when he distinguish'd it from that in 1648, and shew'd what a wide Difference there was between them.

As to that part of the first Article, which charges him with asserting, *That his late Majesty, in his Declaration, disclaimed the least Imputation of Resistance*, if the Dr. had not explain'd himself, he submitted how far he was justified by His Majesty's Declaration, which says, *We have thought fit to go over to England, and to carry with us a Force sufficient, by the Blessing of God, to defend us from the Violence of evil Counsellors, and that his Expedition was intended for no other Design, but to have a free Parliament.* And when the late King James abdicated the Government, what Resistance was there in supplying the Vacancy, by setting King William on the Throne.

But he observ'd, that the great Foundation and Stress upon which this Article depended, was in that Passage of the Doctor's Sermon, Page 11. where he says, *The grand Security of our Government, and the very Pillar upon which it stands, was founded upon the steady Belief of the Subjects Obligation to an absolute and unconditional Obedience to the Supreme Power, in all Things lawful, and the utter Illegality of Resistance, upon any Pretence whatsoever.*

But he said the Charge cou'd not be supported by any Words in that Sentence; for it was evident, that the absolute and unconditional Obedience which he says Subjects are obliged to, is, *To the Supreme Power, in all Things lawful*; and the utter Illegality of Resistance, upon any Pretence whatsoever, (being in the same Sentence) must be intended, *of the Supreme Power, in all Things lawful.* And nothing was more true than this, viz. *Where the Thing commanded by the Supreme Power is lawful, the Resistance given to it must be unlawful.* And this was all the Dr. had asserted here.

That it was true, there were no general Rules without Exception, and yet the Person who cites them, seldom or never mentions the Exception; for whenever such general Propositions were urg'd, the Exceptions are always understood and implied, and whether in this Case to have nam'd the Exception,

859.

wou'd not have been a greater Reflection on the Revolution, than the preaching this Doctrine in general Terms, without naming it, he submitted to their Lordships; for to name it now since the Revolution, wou'd be to suppose, that it was not imply'd or understood as an Exception out of that general Proposition before the Revolution, and then the Exception is to be warranted by the Revolution; which was to infer, that no Resistance was lawful till the Revolution; whereas they held, that such an extraordinary Case as that of the Revolution, was always imply'd as an Exception out of that general Doctrine, and so the Doctrine justifies the Revolution.

Resistance
charg'd on
the D. of Mon-
mouth as a
damnable Sin.

Besides, this Doctrine had been affirm'd in as general Terms, by learned Men in all Ages, and by the Legislature: That the present Archbishop of *Canterbury*, the late Bishop of *Bath and Wells*, the present Bishop of *Bath and Wells*, and the then Bishop of *Ely* being appointed by King *James* to attend the Duke of *Monmouth* at his Execution, press'd him to acknowledge himself guilty of *Rebellion*: To which his Answer was, *He died a Protestant of the Church of England*, whereupon they reply'd, *If you be of the Church of England, you must acknowledge the Doctrine of Non-Resistance to be true.*

Archbishop *Tillotson* in his Letter to my Lord *Russel*, says, *That the Christian Religion does plainly forbid the resisting of Authority, and that in the same Law which establishes our Religion, it is declar'd, That it is not lawful, upon any Pretence whatsoever, to take up Arms against the King.*

Bishop *Sanderfon*, p. 522. says, *No Conjunction of Circumstances whatsoever, can make that expedient to be done at any time, that is of it self, and in the kind, unlawful. For a Man to take up Arms offensive or defensive against a lawful Sovereign, being a thing in its Nature simply, and de toto genere unlawful, may not be done by any Man, at any time, in any Cases, upon any Colour or Pretence whatsoever.*

That

That these great Men carried this Doctrine much higher than Dr. *Sacheverel*, and it had been the concurrent and universal Opinion of all the learned Men in our Church in all Ages, *That Resistance of the Sovereign Power was not lawful on any Pretence whatsoever*, and no Censure or Punishment had been inflicted on any of them, or any Fault found with them, to this Day.

And whereas one of the learned Managers, to enforce the Legality of Resistance, was pleas'd to urge the *Original Contract*, as the Foundation of the what it is, and Prerogative of the Crown, and the Liberties of the People, and had asserted, That if the Supreme Executive Power, invaded the Rights of the People, the Contract was dissolv'd, and the People discharg'd from their Allegiance. He observ'd, that this Gentleman did not think fit to inform us when this original Contract was made; or if it was before *Magna Charta*; for if it was, How came it not to be compriz'd in it? All the Liberties the Subject then claim'd, being included in that Act; and 'twas much, a thing of that Moment, and which was the Source and Spring of all their Liberties, should not be so much as mention'd in it: For his own part, he never met with it in our Law-books, or heard it urg'd in any Court, or even knew it pleaded to an Indictment for High Treason, on the 25th of *Edw. the III.* to enervate the Force of that Statute: And till the Legislature were pleas'd to declare what the *Original Contract* was, and what Act of the Supreme Executive Power should amount to a Dissolution of that *Original Contract*, and discharge the Subjects from their Allegiance, he must beg pardon if he thought, That as to Resistance in general, the Law stood still upon the 25th *Edw. III.* And that all Resistance, except in the Case of the *Revolution*, was still Treason within that Act. 860

And he observ'd, That this Doctrine of Passive Obedience and Non-Resistance, Archbishop *Tillotson*, in his Letter to my Lord *Russel*; says was the *Doctrine of all Protestant Churches*.

And to show that this Doctrine had receiv'd no Alteration since the Revolution, he cited Bishop

Beveridge's Book, call'd, *Private Thoughts of Religion*, Page 247, 249, and 250. where he says, *Upon any seeming or real Default or Defect of our Sovereign, we are to be more earnest in our Prayers and Intercession for him, but upon no Account to fight or rebel against him.* And that this Book had Her Majesty's Royal License, and was counter-sign'd by the Lord Sunderland.

861. He cited also Dr. Kennet's Sermon the 30th of January, 1705; the Bishop of St. Asaph's Sermon the 30th of January, 1699; the Bishop of Lincoln's Sermon the 30th of Jan. 1708; the Archbishop of York's Sermon in 1700; and the Homilies against Rebellion; and said, That this Doctrine having been preach'd and publish'd with the Approbation of both Houses of Parliament, since the Revolution, he conceiv'd it had receiv'd no Alteration by it: That we had had many Revolutions, and yet this Doctrine continued the same, according to the Bishop of Carlisle, in his Sermon preach'd before their Lordships, the 30th of January, 1702, where he says, *Our Foundations, 'tis to be hop'd, are not shaken by the weight of those many great and extraordinary Revolutions, that have pass'd upon us. The Allwise Providence has frequently, of late, (and, as some of us always thought, very graciously) exchange'd our Governors; but if we ungratefully alter our Notions of the Divine Right of Government, and throw off our ancient and primitive Rules of Obedience, we shall make an unworthy Return for the Mercies we have receiv'd.*

And he hop'd he might conclude their Lordships were of the same Opinion, since the Bishop had their Lordships Thanks for his Sermon, and was desir'd to print it.

And cou'd the Dr. be a Criminal for preaching that Doctrine which had been asserted by so many Archbishops, Bishops, &c. not only with Impunity, but with the Approbation of both Houses of Parliament: A Doctrine enjoin'd by the Church, ratify'd and establish'd by the Legislature; which was the Doctrine of all Protestant Churches, and

of our Saviour himself, and which had been the Doctrine ever since *Adam*, and wou'd continue so, as long as there was a Bible upon Earth.

And whereas it had been objected, That it was highly improper, for Divines, in their Pulpits, to meddle with Things of this Nature: Besides the Injunctions the Apostles laid upon their Successors, *To put the People in Mind of being subject to Principalities and Powers*, he shou'd offer a seditious Paragraph or two, which made this Doctrine the more seasonable at this Time, viz. Out of the Review, printed in 1705, where he says, *If the next Parliament shou'd pursue the Steps of the last, the Nation, in my Opinion, will be so much nearer that Crisis of Time, when English Liberty being brought to the last Extremity, must open the Magazine of Original Power.* And speaking of the Family of the Stuarts, he calls it, *The Line of all the World fam'd for Blood, and that had ravag'd the best Families of the Kingdom.* And in another place, *In short, if Jure Divino comes upon the Stage, the Queen has no more Title to the Crown than my Lord Mayor's Horse: All the People are bound by the Laws of God to depose her, as an Usurper, and restore their rightful and lawful King, James the Third.*

If this was not sounding a Trumpet to Rebellion, and made this Doctrine seasonable and necessary to be preach'd, he submitted to their Lordships, and hop'd, that instead of laying *an indelible Mark of Infamy* on this Doctrine, their Lordships, for the Preservation of Her Majesty, and her Successors, and for securing the Peace of the Kingdom, wou'd convey this Doctrine, entire and in as full force, down to Posterity, as it was transmitted to their Lordships by their noble Ancestors.

And as one of the Managers had desir'd that their Lordships wou'd direct what Doctrine Ministers shou'd preach; if there was any Doctrine, except that of the Deity, of greater Antiquity, and more useful or necessary for the Preservation of Government, then they submitted that this shou'd be left alone: And upon the whole, he was in their

Lord.

Lordships Judgment, Whether upon Consideration of what had been said, the Dr. was guilty of the High Crimes and Misdemeanors contain'd in the first Article.

Mr. Dee's Argument for the Dr. on the first Article.

Mr. Dee being also assign'd of Council for the Dr. he said, He observ'd that it had been urg'd by some of the Managers, That this was a very improper Time to preach up this Doctrine of Non-Resistance, because it was a Doctrine fit only to be preach'd in the Reign of a bad Prince; but he thought if it was seasonable at any Time, it was so when so gracious a Princess was upon the Throne, much rather than in the Reign of a Tyrant or Usurper.

That it had been urg'd as a Maxim, *That there can be no Right, but there must be a Remedy*; and thereupon it was hinted, There was some secret Right vested in the People, to do something they did not think fit to name: But tho' that Maxim might hold, as to legal Remedy, when a Man's Property was invaded, he never understood the Maxim to be meant of a Remedy by Force; and in most Cases such a Remedy was worse than the Disease.

863.

That by the Act of General Pardon, pass'd the 2d of W. and M. it is provided, *That nothing in that Act shou'd extend to Pardon, or discharge any one from counselling or procuring the raising War against Their Majesties, after the 13th of February, 1688, unless such Person shou'd, before the 26th of July, take the following Oath*; and then follows the Oath of Allegiance: From whence he inferr'd, That if any thing had shaken the Doctrine of the Illegality of Resistance, Resistance was thereby made as Criminal as it was before: For to what Purpose shou'd the Oath of Allegiance be made the Condition of a Pardon for having resisted, unless they thought that Oath laid an Obligation on the Persons not to do it again.

He said, A great deal of Time having been spent, he shou'd only remark further, That the Managers had drawn many Inferences by their Skill and Ingenuity

genuity, which he believ'd their Lordships cou'd not think the Dr. ever thought of.

Dr. *Henchman* being also assign'd Council for Dr. *Henchman's* Argument for the Commons Impeachment to be, the Doctor's ment for the condemning all *Resistance*, and consequently, the Dr. on the *Resistance* that was necessary at the Revolution: first Article.

864.

But he said, if nothing wou'd satisfy the Gentlemen of the House of Commons, but an Exception, they shou'd have one out of his own Mouth. And it was at the 10th Page of the Sermon, and in the beginning of that very Paragraph where the whole Foundation of the Accusation was laid, and the Words were these, viz. 2dly, *Men may be denominated False Brethren, with Relation to the State, Government, or Society, of which they are Members. The Constitutions of most Governments differing, according to their several Frames and Laws upon which they are built and founded, it is impossible to lay down any one universal Rule, as the Scheme and Measure of Obedience, that they square to every one of them.* And he goes on, *Only this Maxim in general, I presume, may be establis'd for the Safety, Tranquility and Support, of all Governments, That no Innovation whatsoever shou'd be allow'd in the fundamental Constitution of any State, without a very pressing, nay, unavoidable Necessity for it.*

That in these Words there was a plain Exception made, whenever the Case of an unavoidable Necessity shou'd happen; and no Body wou'd deny that the Revolution was such a Case. But it was strange, that this Exception shou'd stand so full and plain in the Front of that very Paragraph, from whence the Managers had chiefly drawn their Accusation, and never be once taken notice of by them; Passages at a much greater Distance had been connected, in order to accuse him, and there cou'd be no Reason given, why the subsequent Passage in the same Paragraph shou'd not be explain'd by this; why what in the beginning was said of all Governments, shou'd not be extended to that part where he speaks particularly of our own Constitution: This, no doubt, he

he had in his Thoughts, and wou'd, he hop'd, sufficiently vindicate him from this Charge.

Then the Doctor's Council said they were ready to produce their Vouchers, that this Doctrine was agreeable to the Doctrine of the Church of England, and the Laws of the Land, and had collected the several Passages for their Purpose, out of the Homilies, Articles, Sermons, and Acts of Parliament; and had a Person ready to make Oath that they were truly collected; but if there were any Objection, they had the Books themselves ready to produce.

Mr. Trap was sworn.

Here the Managers desir'd to withdraw, to consider if they shou'd admit of this sort of Evidence, and the Lords withdrew to their House above, and being return'd, Sir Joseph Jekyl said they were contented the Doctor's Council shou'd go on in the Way they had propos'd.

And Mr. Trap propos'd, That the Transcripts produc'd were true Copies.

Then the Lords adjourn'd to their House above.

Sixth Day. Saturday, the 4th of March.

Passages out of the Homilies, and other Books, shewing, That the Doctrine of Non-Resistance was the Doctrine of the Church of England.

The Court being sat, the Lord Chancellor directed the Doctor's Council to proceed with their Proofs; whereupon the Clerk read an Extract out of a Book, call'd, *A necessary Doctrine and Exposition for any Christian Man*, set forth by the King, the 34th of Henry VIII. (being part of the Exposition of the Fifth and Sixth Commandments) p. 113, 187.

Then some Extracts out of the Homilies were read, viz. Out of the Second Part of the *Sermon of Obedience*, p. 110, 113. Out of the Third Part of the *Sermon of Obedience*, p. 114. Out of the First Part of the *Sermon against wilful Rebellion*, p. 589, 590. Out of the Second Part of the *Sermon against wilful Rebellion*, p. 600, 601, 602. And the Thirty-fifth Article of the Church of England, approving these Homilies, was read.

Mr.

Mr. *Phipps* observ'd, That the Articles were confirm'd by the 13th of *Eliz.* which the Managers admitted.

After which Bishop *Overal's Convocation-Book*, p. 107. *Can. 1.* was read.

An Extract out of *Stripe's Memorial*, p. 387. 867.
shewing Archbishop *Cranmer's* Opinion of Resistance, was read.

Also an Extract out of *Fox's History*, Vol. 3. p. 101. shewing the Opinions of Bishop *Ferrar*, Bishop *Hooper*, Bishop *Coverdale*, and nine other Bishops, in Queen *Mary's* Reign.

An Extract out of Bishop *Jewel's Defence of the Apology of the Church of England*, fol. 19. was read.

An Extract from Mr. *Hooker's Ecclesiastical Polity*, fol. 470. London Edit. 1705. was read. And the Managers desiring that the Clerk might read Mr. *Hooker* also, from p. 444, to p. 446. it was read by the Clerk accordingly. 868.

Bishop *Andrew's Sermons*, London Edit. 1632. 869.
p. 939. was read.

Another Extract out of Mr. *Hooker's Treatise of Church Government*, 4to. Edit. London, 1601. p. 49, 50. was read.

An Extract out of Dr. *Jackson, Tom.* 3. p. 965. was read.

An Extract from a Treatise of Archbishop *Usher's* entitled, *The Power communicated by God to the Prince*, &c. 8vo. London 1683. p. 157.

An Extract out of Mr. *Chillingworth*, Folio. London, 1704. p. 330. was read.

An Extract from Archbishop *Bramhall*. Folio. 870.
Dublin, 1678. p. 531. 542.

An Extract from Bishop *Sander son*, fol. 522.

The Decrees of the University of *Oxford*, as published in the *London Gazette*, the 26th of July, 1683, were read. 871.

Archbishop *Tillotson's* Letter to the Lord *Russel*, 872.
when he was under Condemnation, read.

An Extract out of a Book of Bishop *Stillingfleet's*, 873.
entitled, *A Vindication of the Answer to some late Papers*, &c. Lond. 1687. p. 89.

Bishop

Bishop *Stillingfleet's* Discourse, of the *Unreasonableness of a new Separation*, London, 1689. p. 9. read.

An Extract from a Book of Dr. *Sherlock's*, entitled, *The Case of Allegiance stated*, London, 1691. 4th. p. 37.

874. Her Majesty's License to print Bishop *Beveridge's* *Private Thoughts*, Counter-sign'd, *Sunderland*, was read: Then was read an Extract from the said Book, Lond. 1709. 8vo. p. 251. to p. 254.

An Extract out of a Treatise of the Archbishop of *Canterbury*, entitled, *The Creed of Mr. Hobbs examin'd*, Lond. 1670. p. 158, 160, 161. was read.

A printed Paper entitled, *An Account of what pass'd at the Execution of the late Duke of Monmouth, on Wednesday the 15th of July, 1685. on Tower-Hill*, was read.

875. An Extract from the Archbishop of *York's* Sermon, preach'd before the Lords, the 30th of *January*, 1700. p. 13. and p. 19, and 20. and the Thanks of the House for that Sermon were read: And the Managers desir'd the Clerk might read what follow'd p. 20. to show the Candor of the

876. Doctor's Quotations: And the Clerk read on accordingly. And the Managers desir'd that the 6th Page of that Sermon also might be read. *Which was done.*

Then the Doctor's Council desir'd that what preceded the last Passage in the 6th Page might be read. *Which was done.*

877. An Extract from the Bishop of *Worcester's* Sermon, when he was Bishop of *St. Asaph*, preach'd before the late Queen, the 29th of *May*, 1692. p. 18, and 19. was read.

An Extract from the Bishop of *Rochester's* Sermon before the Artillery-Company, upon the 29th of *May*, 1692. p. 5, 25, and 26.

An Extract from a Treatise of Bishop *Burnet's*, entitled, *A Vindication of the Authority, Constitution, and Laws, of the Church and State of Scotland*; printed at *Glasgow*, 1673. p. 41, 42.

878. Another Sermon of Bishop *Burnet's* cited, preach'd at *Guild-hall*, 1689. p. 30.

The

The Managers here desir'd the 17th Page of Bishop Burnet's Book, call'd, *A Vindication*, &c. might be read. *Which was done.*

An Extract from the Bishop of Ely's Sermon, preach'd at *Guild-hall*, the 26th of *January*, 1684. p. 19, 20, and 21. read.

The Bishop of Bath and Wells Sermon before the King at *Whitehall*, 5 *Novemb.* 1681. p. 11, and 19. read.

The Bishop of Lincoln's Sermon, preach'd before the Lords, 30 *Jan.* 1707. p. 15, 16, 17, and 18. read: And the Clerk was directed by the Managers, to read the two or three following Pages. *Which he did.* 879.

The Bishop of Exeter's Sermon on Her Majesty's Accession, p. 13, 14. read. 880.

The Bishop of St. Asaph's Sermon, preach'd before the Lord Mayor, 30 *Jan.* 1698. p. 18.

The Bishop of Carlisle's Sermon, 30 *Jan.* 1702. before the Lords, p. 31. read; with their Lordships Thanks for that Sermon.

A Sermon preach'd before the Commons, by Dr. Eyre, the 30 *Jan.* 1707. Another by Dr. Kennet, the 30 *Jan.* 1705. Another by Dr. Delaune, the 30 *Jan.* 1702. Abstracts out of them read, with the Thanks of the House for the respective Sermons.

Then the Doctor's Council proceeded to exhibit several Acts of Parliament, to prove, that this Doctrine was agreeable to the Laws of the Land; and the 12 *Car. 2. c. 30.* was read; which declares, *That the People, collectively or representatively, have no coercive Power over the Person of the King, &c.* Several Acts of Parliament read, to shew the Unlawfulness of Resistance. 881.

The 13 *Car. 2.* was also read, call'd, *The Corporation Act*, whereby every Officer in a Corporation was to declare upon Oath, *That it was not lawful, on any Pretence, to take up Arms against the King.*

The 13 and 14 *Car. 2. cap. 3.* call'd *The Militia Act*, was also read; whereby every Officer and Soldier of the Militia was to declare, *That it was not lawful, upon any Pretence, to take up Arms against the King, &c.*

The

The *Act of Uniformity*, 13 and 14 *Car. 2. c. 4.* enjoining all the Clergy, Members of the Universities, Schoolmasters, &c. to subscribe the Declaration, *That it was not lawful, upon any Pretence whatsoever, to take up Arms against the King, &c.* read.

882. *The Prince of Orange's Declaration*, shewing The Prince of the Reasons that induc'd him to appear in Arms in *Orange's De- England*, dated at the *Hague*, the 10th of *October*, 1688, was read thro' clarification read.

His Highness's additional Declaration was also 887. read, dated, the 24th of *Octob. 1688.*

Then the Lords adjourn'd to their House above.

Seventh Day. *Monday*, the 6th of *March.*

The Court being sate, and the Lord Chancellor directing the Doctor's Council to proceed in his Defence, whereupon

Mr. Dodd's Argument for to the Second Article, viz. *That the Toleration was the Dr. on the unreasonable, and the Allowance of it unwarrantable: That he is a False Brother, who defends* second Art.

Mr. Dodd enter'd upon the Doctor's Defence, as 888. *That the Toleration was unreasonable, and the Allowance of it unwarrantable: That he is a False Brother, who defends Toleration and Liberty of Conscience: And that it is the Duty of the chief Pastors to thunder out Anathemas, &c.* He said, They held there was no Toleration granted by Law: That indeed, there was an *Act*, *To exempt Protestant Dissenters from the Penalties of certain Laws*; but in a legal Proceeding the *Act* ought to have been call'd by its proper Name: That the Dr. never intended to reflect on this Legal Indulgence, (or Toleration,) he said was plain from these Words in his Sermon, viz. *Pray do not misunderstand me, as if I reflected on that Indulgence the Government has given to Dissenters, which I am sure all Well-wishers to our Church are ready to grant: Nor do I intend to cast the least Reflection on that Indulgence which the Law has given to Consciences truly scrupulous; let them enjoy it, in the full Limits the Law has prescrib'd.*

That after so plain a Declaration, he conceiv'd it was hard to draw Inferences and Consequence, that the

the Dr. was against the Toleration allow'd by Law, and he said the Dr. did not stile those False Brethren, who defended this legal Toleration, but those who excus'd Separation from the Church, not only on Account of the Toleration, but *by laying the Faults on the true Sons of the Church, for carrying Matters too high*: These were the False Brethren who cry'd out against the Church upon all Occasions. And he observ'd, That the Toleration he blam'd Archbishop Grindal for, was very different from the present Indulgence that was by the Queen's, or the Archbishop's Authority, without a Parliament, and the Dissenters were then few, and it had been no great Difficulty to have prevented the Schism at the beginning; tho' now they were grown numerous, rich, and powerful, and the Legislature had thought fit to grant them an Indulgence according to the Restrictions in that Act. And he said they shou'd shew, that it was the Archbishop's Indulgence to Dissenters that drew on him the Queen's Anger, by his own Letter to the Council, and Letters from Calvin and Beza, and that it was not occasion'd by what the Managers had suggested.

That the Toleration the Doctor found fault with, was such a Toleration as wou'd make Religion like that of the *Samaritans*, a Mixture of all sorts, which was odious to the World, and an Abomination to the Jews; and they apprehended such a Toleration was not to be defended, and cou'd be of no Service either to Church or State.

Indeed the Dr. did think that the Occasional Conformists did attempt to hoist the Toleration into an Establishment; and came into the Church to serve a particular Purpose, but this was only the Doctor's Opinion of that Matter, and, whether true or false, cou'd not be criminal; but had the Dr. spoken against any Law, he had been punishable in the ordinary Methods of Justice, and there needed not a Proceeding of this Nature.

As to the thundering out Anathema's, the Discourse was general, and not pointed at Dissenters, but was rather intended against Irreligion; and the

Sentence he dar'd any Power on Earth to reverse, was only such as was ratified in Heaven; but from hence to infer, That he asserted the State had not Power to reverse a Sentence of the Spiritual Court; or that the Legislature was guilty of Blasphemy, as had been objected by a Manager, was neither true Reason or Logick.

889. That Schism was a Sin punishable by the Laws of the Church, was not to be disputed, but how far this Separation was such, or the Act of Parliament had taken away this Schism (or Sin) they submitted to their Lordships.

Mr. Phipps's
Argument for
the Dr. on
the second
Article.

Mr. Phipps, in his Defence of the Dr. as to the Second Article, said, That it was not the Toleration Act the Dr. found fault with, but the Abuse of it; and he begg'd leave to be of his Opinion, That the ill Use that was made of it was *unreasonable and unwarrantable*. And he said, when the Paragraphs in the Doctor's Sermon, upon which this Article was founded, were consider'd, it wou'd appear to be a great Mistake, That he asserted the Toleration it self to be *unreasonable or unwarrantable*. The first Passage insisted on to prove this Charge, he observ'd, was at p. 8. where the Dr. says, *If upon all Occasions to comply with the Dissenters, &c.* But he did not see any thing in this Passage that avers the Toleration was unreasonable: That the next place produc'd to prove this Article was at p. 10. viz. *Our Constitution, both in Church and State, has been so contriv'd, &c.* But here the Dr. only spoke of such as innovate, alter, or misrepresent the Articles of our Faith: And the Dissenters did not differ with us in Matters of Faith, but in Matters of Form and Ceremony: If they differ'd from us in Matters of Faith, they wou'd be Hereticks; and Heresy was never intended to be tolerated by the Act of Indulgence; and therefore what was said in this Paragraph cou'd be no Reflection on the Toleration: That in the Clause cited at the 14th Page, the Dr. says no more, than that the Toleration never was intended to indulge and cherish such Monsters and Vipers in our Bosom, as Atheists, Tritheists, Socinians, &c. and the Dr.

was well warranted in saying this, because those enormous Crimes are excepted in the Act of Toleration, and where-ever he condemns the Toleration, it must be intended as to such Dissenters as are excepted, and not entitled to the Benefit of the Act. As to that Passage, p. 16. where he says, *What could not be gain'd by Toleration, must be brought about by Moderation and Occasional Conformity, &c.* The Dr. ascribes the Injuries done to the Church, to other Causes than the Toleration, and consequently did not reflect on it: And the Dr. having so fully asserted, at p. 20. that he design'd no Reflection on the Indulgence granted by Law; it was conceiv'd, if there were any other Expressions that carried a dubious Sense, they ought not to be apply'd to the Exemption granted by Law, but ought to be so interpreted as might consist with his avowed Approbation of that Law. And it was evident, when he condemns such as defend Toleration, he meant those who maintain, That the Act of Indulgence is a Justification of their Separation, and excuses them from the Sin of Schism: And was the Dr. alone in this Notion? Was he not justified in it by the concurrent Opinion of all the learned Men of our Church?

890.

And since the Act of Uniformity is still in Force, and the Doctrine and Worship of the Church of England is yet the establish'd Religion of this Kingdom, whether a Separation from the Church, since the Act of Indulgence, was not as much a Schism in *foro Conscientia*, as it was before, was humbly submitted: However, having so many learned Men of his Side, his Assertion cou'd not be said to be wicked, malicious and seditious, or to amount to a High Crime and Misdemeanor.

That as to his Assertion about Archbishop Grindal, their Lordships wou'd observe from the Archbishop's own Letter to the Council, that he was not innocent; for he confesses he refus'd to suppress these Prophesyings (or Conventicles) as he had been commanded by the Queen and Council, and acknowledges it to be an Act of great Clemency in

Her Majesty, that she carried her Resentment no higher: And the Puritans so encreas'd, and grew so dangerous in his Time, that it occasion'd the Statute of the 35th of *Eliz.* for suppressing their Conventicles, and Archbishop *Whitgift*, who succeed *Grindal*, was put to great Trouble to suppress that growing Faction, and reduce Things to good Order again; If therefore the Dr. out of his Zeal to the Church, had been provok'd to use a harsh Expression, of one who had been at the Head of it, by whose Connivance the Church receiv'd some Prejudice, it was humbly hop'd it was not a sufficient Ground for an Impeachment.

891. Nor cou'd the Doctor's calling the Prosecutions by Queen *Elizabeth*, against such as frequented Conventicles, contrary to Law, *Wholesome Severities*, reflect on the Toleration granted by Law, or encourage a Prosecution against the Dissenters, who were exempt from the Penalties of the Laws: All that cou'd be inferr'd from what the Dr. said in Relation to *Wholesome Severities*, was, That he intended to excite the Magistrates to put the Laws in Execution, against such Dissenters as were excepted out of the Act of Toleration; and that cou'd not make him an Offender, for the Parliament never intended that any Person shou'd have the Benefit of the Act of Toleration, that did not comply with the Terms and Conditions of it. And tho' great Offence had been taken at the Words, *Wholesome Severities*, he cou'd not think it an improper Epithet, for the Severities us'd by Queen *Eliz.* against the Puritans: For such Severities as suppress'd these bold and daring Crimes in their Infancy, might well be call'd *Wholesome*, without a *Catachresis*, and cou'd never be construed to be a Suggestion, That the Toleration now granted by Law is unreasonable, or the Allowance of it unwarrantable.

As to that Passage, p. 25. where he speaks of *Thundering out Anathemas*, it cou'd not be imagin'd he meant against such Persons whom he wish'd might enjoy the Toleration, in the full Limits the Law had prescrib'd, but must be intended against the

the Works of Darkneſs he had mention'd in the preceeding part of his Sermon, viz. Atheiſm, Prophaneneſs, Faction, &c.

And this thundering out Anathema's was no more than declaring thoſe Judgments which were denounc'd in Scripture againſt Sin; And if they were to be apply'd to Diſſenters, it ought to be intended of ſuch Diſſenters as were not entitled to the Toleration, and ſince ſuch Perſons were left to the Law, it cou'd be no Crime to preſs the Execution of the Laws againſt them.

As to that part of the Article, which charges, *That he insolently dares and deſies any Power on Earth to reverse ſuch Sentences*; which are inſinuated to be the Sentences or Anathema's thunder'd out by Superior Paſtors: There were no ſuch Words, the bare recital of the Paſſage was a ſufficient Confutation of this Charge; for the Words were, *Let any Power on Earth dare reverse a Sentence ratified in Heaven*: Now if the Judgments or Anathema's denounc'd by Superior Paſtors againſt Sin, are ſuch as are denounc'd againſt ſuch Sins in Scripture, ſuch Sentences may truly be ſaid to be ratified in Heaven: And if ſo, none dare think, that ſuch Sentences, ſo ratified in Heaven, cou'd be revers'd by all the Powers on Earth; and he hop'd it wou'd not be thought Inſolence, or a High Crime and Miſdeemeanor, to aſſert, what it wou'd be Blaſphemy in any to deny.

Mr. Dee, in Defence of the Dr. upon this Second Article, ſaid, That there were two diſtinct Tolerations mention'd by the Dr. in his Sermon, viz. A legal Toleration, and a general Toleration: And that it was very plain from his Words, that he was for extending the legal Toleration to its utmoſt Bounds; and when he ſpoke of the other Toleration, he ſhews that he meant a Toleration of ſuch enormous Crimes, as were not fit to be tolerated in any Chriſtian Nation.

As to his Reflection on Archbiſhop Grindal, he ſaid they ſhou'd ſhew that he was a falſe Son of the Church: That there were no Laws then made to indulge a Separation, and for the Head of the

Church, under the Queen, to give up the Discipline of the Church, was a High Crime in him.

Larwood's

Case: Held, that he ought to have qualified himself for the Office of Sheriff, by taking the Sacrament, tho' a Dissenter.

As to the thundering out Anathema's, he did not intend it against those who were entitled to the Toleration: But if he had, it was but his Advice, and the Question was, Whether he was wrong in his Judgment or no? For if they were Schismatics before, the Schism remains still, notwithstanding the Toleration: And if that was a Sin, it was the Duty of the Superior Pastors to do it, till prohibited by the Temporal Courts: And that it was still Schism, appear'd from the Case of *Larwood*, 6 W. 3. in an Information exhibited against him, for refusing to take upon him the Office of Sheriff of *Norwich*. He pleaded, That he had not taken the Sacrament in Twelve Months. The Attorney General replied, He ought to have done it. He rejoin'd, That he was a Protestant Dissenter, and was excus'd by the Act of Toleration. And in this Case the Lord Chief Justice *Holt*, and Mr. Justice *Giles Eyre*, held the Bar to be insufficient, because it was only excusing one Fault with another; and they held that the Duty of Communicating with the Church remain'd, notwithstanding the Act of Toleration: And he submitted it to their Lordships Consideration, whether, if it be a Duty to Communicate with the Church of *England*, it be not Schism to separate from it.

Dr. Henchman's Argument for the Dr. on the second Art.

Dr. Henchman, in Defence of the Dr. as to this Article, said, That this Charge was maintain'd only by Inferences, there being no plain positive Proposition it cou'd be supported by: And if what another made the Dr. say was thought a sufficient Ground for an Accusation, then surely what himself had openly declar'd, wou'd be esteem'd something more than a dry Caution, and have its due Weight with their Lordships in his Vindication.

That it seem'd hardly reconcileable, that the same Person, in the same Discourse, shou'd declare, that all who wish well to the Church, are ready to grant Indulgence to Consciences truly scrupulous, and at the same Time maintain, That such Toleration is unreasonable, and the Allowance of it un-

war-

warrantable : That he shou'd desire it might be enjoy'd in its full Latitude, and yet assert he is a False Brother who defends it. 893.

But this seeming Difficulty wou'd be easily reconcil'd, by considering who the Persons were intended to be eas'd by the Act of Exemption, and the Preamble shews it to be intended for *the Ease of scrupulous Consciences*. Now one Sett of False Brethren mention'd in the Sermon are, Men who have no Conscience at all, and others are mention'd, who neither qualified themselves according to that Act, or think themselves subject to the Penalties of former Acts: That other False Brethren describ'd by the Dr. are, *Atheists, Deists, Tritheists, Socinians, Revilers of the Holy Scripture, and such like*. And such Men ought not to be suffer'd to shelter themselves under an Act of Parliament design'd only for the Ease of scrupulous Consciences; and that there were such Men amongst us, he said he shou'd shew from a Book entitled, *A brief but clear Confutation of the Trinity*, at the 9th Page whereof was this Proposition, viz. *The Divinity attributed to the Son and Holy Ghost, is unscriptural and idolatrous*; and p. 10. *This one fundamental false Principle, as well with Jews and Turks as Heathens, has done more Mischief to Christianity, than all other Errors besides*. Some blasphemous Passages recited.

That in the Book entitled, *The Rights of the Christian Church*, the Author, at p. 108. lays down this Doctrine, *Among Christians, one no more than another can be reckon'd a Priest*. And a little after, *The Clerk has as good a Title to the Priesthood as the Parson*: So that these Men strike off our whole Religion at once. By one the fundamental Doctrine of our Faith is destroy'd: And the Ministers who shou'd support and defend that Doctrine are set aside by the other: And was it not high Time that some wholesome Severities were us'd, to put a Stop to the growing Contagion?

But there was one Passage in the 8th Page of the Doctor's Sermon, that had been chiefly urg'd by the Managers as an Insult on the Toleration, which only wanted to be set in a true Light; viz. *Shou'd*

any one out of Ignorance, or Prejudice to the ancient Rights and essential Constitution of the Catholick Church, affirm, That the Divine Apostolical Institution of Episcopacy, is a novel Doctrine, not sufficiently warranted by Scripture, and that it is indifferent whether the Church be govern'd by Bishops or Presbyters, Is not such a one an Apostate from his own Orders?

These Words, he said, cou'd never be meant of the Dissenters, who deny the Divine Institution of Episcopacy; but must be intended of such Persons who had themselves been Episcopally Ordain'd: For the Dissenters cou'd never be said to be Apostates from that Doctrine, which they never own'd or subscrib'd to: And those Persons who had been admitted into Orders, and had subscrib'd it as the receiv'd Doctrine of the Church, were the only Persons who cou'd be said to be Apostates from their own Orders, when they deny'd that Divine Institution by which themselves had been Ordain'd, and consequently were the only Persons intended in this Passage, and term'd, *False Brethren*.

And as to the Sentences of the Superior Pastors of our Church, he hop'd he might say without Offence, That their Spiritual Power was not deriv'd from the Civil Magistrate, but from God; and one Branch of that Power, was the censuring of notorious Offenders, and excluding them from the Communion of the Church. And that this has in all Ages, in Fact, and of Right too, been exercis'd by the Pastors of the Church, by Permission of the Civil Magistrate: And before the Civil Magistrate embrac'd the Christian Religion, the Pastors of the Church inflicted Spiritual Censures on Offenders, for doing such Things as the Imperial Edicts did not only permit but command. And this Power of inflicting Censures on Persons exempted from Punishment by the Laws of the Land, has been always challeng'd, and was now exercis'd by the Reform'd Churches abroad: And by the Rubrick of our own Liturgy, open and notorious evil Livers were to be repell'd from the Lord's Table, until they had openly declar'd their Repentance and Amendment.

The

The Managers, indeed, observ'd, That if the Ecclesiastical Judge shou'd inflict an illegal Censure, the Temporal Courts wou'd grant a Prohibition: But there was a manifest Difference betwixt an Excommunication founded upon a Prosecution in the Ecclesiastical Courts, and the pronouncing Censures purely Spiritual. The external coercive Jurisdiction of Ecclesiastical Courts being deriv'd from the Laws of the Land: But the spiritual Power of the Keys from Jesus Christ: And therefore, tho' it was provided in the Act of Exemption, That Persons taking the Oaths, and making the Declaration in that Act, shou'd not be prosecuted in the Ecclesiastical Court for not conforming to the Church of *England*; yet it was not by that Act express'd or intended, that Nonconformity to the establish'd Church shou'd no longer be look'd upon as Schism, or that Separatists might not, by the Pastors of the Church, be pronounc'd Schismatical. The Laws for Conformity were not repeal'd; tho' the Transgressors of those Laws are releas'd from the Pains and Penalties to which they were obnoxious: But admitting the Laws which require Conformity were expressly or virtually repeal'd; yet whilst the Laws of God, requiring Church-Unity, and forbidding Schism, remain in Force, those who make causeless and unnecessary Divisions, will be guilty of Schism, and may by the Pastors of the Church be censured as Schismaticks.

As to Archbishop *Grindal*, altho' it had been intimated, that the true Ground of his Suspension was, because he wou'd not give up his Mannor of *Lambeth*, to the Earl of *Leicester*, and partly because he censur'd one *Julio* an *Italian*, for an illegal Marriage: The Archbishop acknowledg'd under his own Hand, that it was for not suppressing those Fanatical Exercises of those Days call'd Prophesyings; and frankly acknowledg'd he had given Offence, and that he was for good Policy and Example justly punish'd by Her Majesty: But it cou'd not be for good Policy or Example that he shou'd be punish'd for not alienating the Revenues of his Church,

Church, or for not pronouncing *Julio's* Marriage with another Man's Wife, lawful.

The Toleration Act read.

Then the Doctor's Council desired the Act of the *W. and M.* might be read, *For exempting Prot-*

stant Dissenters from the Penalties of certain

Laws. And it was read accordingly.

897. Then Queen Elizabeth's Letter to the Bishops, dated the 7th of May, 1577. for suppressing the Exercise call'd Prophesying, (being prov'd to be a true Copy of that in the Cotton Library, by Mr. Rawlinson) was read. Vide Cotton Library, Cleopatra, F. 2. fol. 287, 288, 289.

898. Archbishop Grindal's Letter to the Council, dated 29 Novemb. 1577. acquainting them he cou'd not comply with Her Majesty's Command in suppressing these Prophesyings, read; after which

899. Mr. Dodd enter'd upon the Doctor's Defence, as to the Charge contain'd in the third Article, viz. That he does suggest and assert, That the Church of England is in a Condition of great Peril and Adversity, under Her Majesty's Administration, and that in Order to arraign and blacken the Vote or Resolution of both Houses of Parliament, approv'd by Her Majesty, he, in Opposition thereto, does suggest the Church to be in Danger.

And this Charge, he said, they totally deny'd, there was no such Thing in the Sermon: But it was true, he did assert, That when National Sins were ripen'd to Maturity, such a People and Church were in great Danger: And this they did not conceive to be opposite to the Votes of the two Houses: That the Prayers directed to be us'd by Her Majesty are, That no Sedition may disturb the State, or Schism distract the Church, and that we ought all to lay it to Heart, what great Dangers we are in by our unhappy Divisions: But to apprehend from hence, that the Church was in great Danger by Her Majesty's Administration, or that the Dr. had asserted this in his Sermon, especially when he prays, That the Queen might live long, for the Comfort and Support of this Church and Nation; there cou'd be no Ground to quarrel with him upon this Head.

And

And as to the Doctor's intending a Parallel between the People mention'd in the *Lamentations*, whose King was a Prisoner, and they in Captivity, there was no Colour for such an Inference. The People of this Kingdom were in no Captivity, or the Queen a Prisoner, and tho' one of the Managers wou'd have it, that the Dr. meant the Preacher, this cou'd not be, for he all along disclaim'd his Right, and asserted Her Majesty's Right in very express Terms.

And there was as little Reason to believe the Dr. intended to reflect on the Vote of Both Houses, pass'd four Years ago, when he took notice the Church was in Danger from evil Men, from evil Practices, and evil Books that were daily publish'd; this cou'd not be intended to reflect either on the Pastors of the Church, or the Ministry of the Queen; they cou'd not be answerable for all such Pamphlets; and whether a Minister's taking notice of them in the Pulpit, in order to prevent the ill Consequences of them, shou'd bear such a Construction as had been contended for, he thought they might safely submit to their Lordships. Nor cou'd the asserting the Christian Faith to be in Danger now, by Vice and Irreligion, be in Contradiction to the Votes mention'd in the Articles, or subject the Dr. to any Punishment; there was Grounds for a Preacher to take notice of these Things in the Pulpit, their Lordships wou'd observe, from the many Blasphemous Passages that wou'd be read to them in the following Proofs.

Mr. Phipps, in Defence of the Dr. upon the third 900. Article, said, If there was any Expression in the Dr. Phipps's Doctor's Sermon, which suggests the Church to be Argument for in Danger, if it was not also asserted, that the Danger arose from Her Majesty's Administration, the Dr. on the third Art. Dr. cou'd not be an Offender within the Meaning and Intention of this Article, and the several Passages that had been cited to support this Article, wou'd appear, upon Examination, very insufficient to make good such a Charge.

As to that Passage in the 5th Page of the Sermon, where he says, *It were very obvious to draw a Parallel*

parallel betwixt the sad Circumstances of the Church of Corinth formerly, and the Church of England at present, wherein her holy Communion has been rent and divided by factious and schismatical Impostors, her pure Doctrine corrupted, &c. and this with Impunity, nay, without Discouragement, by our pretended Friends and False Brethren, &c. There was too much Truth in this Clause: But it was not said here, that these Evils were owing to Her Majesty, or proceeded from her Administration.

As to that Passage in the 14th Page, that had been insisted on, where the Dr. shews the Danger the Government might be in from Occasional Conformists being admitted into Offices and Places of Trust, there was not one Word of the Church being in Danger by Her Majesty's Administration: And both Lords and Commons were of Opinion, it was not safe to trust Occasional Conformists with the Guardianship of our Church and Crown, when they agreed to the Bill for preventing Occasional Conformity; tho' that Act did not pass into a Law.

901: As to the next Passage, at the 15th Page, which was cited to support this Article, viz. *To lay before you the great Peril and Mischiefs of these False Brethren, in Church and State; which I shall endeavour to do, by proving that they weaken, undermine and betray, in themselves, and encourage, and put it into the Power of our profess'd Enemies, to overturn and destroy the Constitution and Establishment of both, &c.*

These False Brethren, he said, were the Occasional Conformists mention'd in the preceding Page: And if, as the Dr. suggested, there were any that Communicated at the Altars of our Church, who disown'd her Mission, refus'd to comply with her Liturgy, and were Enemies to her Constitution: If *Arians, Socinians, Deists*, and almost all Dissenters, and other Enemies to the Church, Communicate with her to get Places and Preferments in Church and State, what Prejudice the Church might receive from such False Brethren, he submitted to their Lordship's Judgments. Only

Only he desir'd to observe, what was said by the Commons, at a Conference, upon the Bill to prevent Occasional Conformity, viz. 'That when the Corporation and Test Acts were made, the Parliament thought they had secur'd our Establishment in Church and State, and had provided a sufficient Barrier, to defeat any Attempts upon them, by enacting, *That all in Office shou'd receive the Sacrament, according to the Usage of the Church of England*: And never imagin'd a Sett of Men wou'd arise, whose Consciences were too tender to obey the Laws, but harden'd enough to break thro' any.

And having shewn, that the Passages cited by the Managers, did not prove, that the Dr. asserted the Church to be in Danger by Her Majesty's Administration, he said he shou'd next observe, from what Causes the Dr. did suggest the Danger of the Church to arise; and of these he said Schism was one; and that Schism might distract the Church, appear'd by the Prayer lately added to our Liturgy; and that Separation from the Establish'd Church, which impos'd no sinful Terms of Communion; is Schism, all the Learned Men of our Church agreed: And altho' it cou'd not be imagin'd (nor was it asserted by the Dr.) that Schism shou'd grow to such a Head, as to endanger the Church, during Her Majesty's Administration, yet of what ill Consequence it might be to the Church in another Age, no Body cou'd pretend to know.

And when Men attack the Articles of our Religion, call the Doctrine of Non-Resistance a blasphemous Doctrine, and such heretical and antimonarchical Principles, were avow'd and maintain'd, how cou'd Her Majesty or the Church be safe? and these were some of the Things alledg'd by the Dr. to be dangerous to Church and State: But the chief Causes from whence the Dr. suggested the Danger of our Church and State to proceed, were to be found at the 20th Page, viz. *Atheism, Profaneness, and Immorality*; and Multitude of Instances there were in sacred and prophane History, of Judgments brought down upon Kingdoms and Nations for these Sins.

Cou'd

Could England be secure from such Judgments, when some amongst us scarce own'd the First Person of the Trinity, by whom they were Created, but many had the Boldness to deny the Divinity of the Second Person of the Trinity, by whom they were Redeem'd: Some few Instances whereof, (of the many they shou'd produce in Proof) he begg'd leave to mention, viz.

Some blasphemous Pages recited.

A Treatise, entitled, *A brief but clear Confutation of the Trinity*, where the Author says, Page the 9th, *The Divinity attributed to the Son and Holy Ghost, is unscriptural and idolatrous.* Page 14, *To be short, Trinitarianism is Polytheism and Idolatry, if there be any such Thing in Nature.*

Another Book, call'd, *Brief Notes on the Creed of Athanasius*, speaking of the Trinity and Incarnation, says, *A Belief in these Points is in no Degree necessary, much less necessary before all Things.*

The Account of the Growth of Deism, says, Page 17, *Many Doctrines are made necessary to Salvation, which it is impossible to believe, because they are in their Natures Absurdities.* Page 22, *One of my old Acquaintance always thought the Moral Part of the Bible very good: But he also thought, by the Strength of his own Reason, he cou'd have writ as good a Moral himself.*

And tho' these Sins might not grow to such a height during Her Majesty's Life, to endanger the Church and State; yet if not prevented, they might take such Root now, as might hereafter endanger the State, the Church, and even Christianity itself: For as among Men *Nemo repente fuit turpissimus*, so Heresies and Schisms in the Church, Factionous and Seditious Principles in the State, are not invented or rise to their height at once, but steal by degrees upon Church and State; and one of the best Ways to prevent the spreading of the Contagion, was by our Ministers shewing the Heinousness of these Crimes, and the dangerous Consequences that attend them, and they submitted it to their Lordships, whether the Dr. had any otherwife asserted

the

the Church to be in Danger, than from what might happen to her from the Consequences of such Sins.

And whether the Votes made in 1705, were design'd to extend to what shou'd happen four Years after, whereas it was impossible for the Wit of Man to foresee what might happen in so long a Time was humbly submitted.

For shou'd the *French* have prevail'd in *Flanders*, and the Pretender been successful, when he invaded us with an Army of *French* Papiſts, it wou'd have been impossible to have made the Generality of the People avoid thinking both Church and State too in Danger, under those Circumstances.

As to that part of this Article, which charges the Dr. with comparing the late Vote, with that Vote of King *Charles's* being out of Danger, the Dr. himself had given the best Answer to it, viz.

First, That he did not draw any such Parallel. *Secondly*, That he had not mention'd the late Vote of the Two Houses. And, *Thirdly*, If he had, there might be some People conspiring the King's Ruin, while others Voted him out of Danger. And so while the Two Houses Voted the Church out of Danger, others might be conspiring its Ruin; and many others, by their Vice and Infidelity, might be drawing down God's Judgments upon Church and State.

Mr. *Dee*, in Defence of the Dr. upon the third Article said, That these Words, *Danger of the Church*, seem in the Articles to bear one Sense, and in the Doctor's Sermon another: That the Danger suggested in the Article, was a Danger arising under or from Her Majesty's Administration; but no such Danger was insinuated by the Dr. he only asserts, That the Church of *England* was in a State of great Peril and Adversity: Which general Assertion, he hop'd, was not Criminal; especially, since he does not say there was any formed Body of Men conspiring to overthrow the Church; but only, That such and such Men are False Brethren, who endanger the Doctrines and Discipline of the Church:

And

And that he did not suppose any Danger arose from Her Majesty's Administration, also appear'd from his *praying so heartily for Her Majesty's Life, and that she might long continue a Support and Comfort to this Church and Nation.*

As to the Parallel he was said to have drawn between those who Voted King Charles out of Danger, and the late Vote of the Two Houses, That the Church was out of Danger, he gave the same Answer to this part of the Charge, that the Dr. had given.

The speaking against a known Law criminal, but *quere*, if it be criminal to contradict a Vote in Parliament.

And admitting the Dr. had contradicted the Resolutions of Both Houses, he submitted it to their known Law Lordships, what Crime it was: Indeed the contradicting a known establish'd Law, might be seditious: But whether a Vote was so publick an Act, that the contradicting of it (even without taking notice of it) were such a Crime as wou'd bear an Impeachment for High Crimes and Misdemeanors, he humbly submitted to their Lordships.

And he said, They humbly hop'd, that notwithstanding any thing that had been offer'd, their Lordships wou'd be of Opinion, that the acquitting the Dr. wou'd be a noble and convincing Proof of the Truth of that Vote, That the Church of England (of which the Dr. was a true, but unfortunate Son) was in a safe and flourishing Condition, under Her Majesty's Administration.

Dr. Henchman's Argument for the Dr. on the third Art.

Dr. Henchman, as to the Charge contain'd in the third Article, said, That if by the Words, *Under Her Majesty's Administration*, was to be understood, *By the Course of Her Majesty's Administration*: It cou'd not be maintain'd, either from the general Scope and Design of the whole Sermon, or from any particular Passages contain'd in it. But if by the Words, *Under Her Administration*, was meant only, *during Her Administration*, then he apprehended there might be Perils under Her Majesty's Administration, which no way proceeded from her Administration, and which might be mention'd without a seditious Thought of reflecting on Her Majesty's happy Administration.

Nor

Nor cou'd it be presum'd that any one wou'd so far prevaricate with God and Man, as openly to *thank God for the peculiar Happiness that we now enjoy by Her Majesty's sitting on the Throne of her Ancestors, and to beseech him long to preserve her there, for the Support and Comfort of the Establish'd Church,* and yet in the same Discourse assert, That that Church was in great Adversity *under, that is, from, Her Majesty's Administration.*

That the Dangers of the Church, mention'd by the Dr. arose either from Infidelity and Prophaneness, which the Authors already cited made too evident; or they proceeded from Vice and Immorality: And the Laws of the Land, and the many Proclamations issued out upon that Occasion, were an undeniable Evidence of the growing Danger of the Church upon this Head. That in the Close of these Proclamations, Her Majesty declares her Resolution to punish all manner of Vice, Immorality and Prophaneness, in Persons of all Degrees whatsoever, and particularly in such as are near Her Royal Person; and these Proclamations are order'd to be read by all Ministers, and they are directed to incite and stir up their Congregations to the Practice of Piety and Virtue, and the avoiding all Immorality and Prophaneness: And hard was the Fate of Ministers, if they must reprove Prophaness in Men of all Degrees, on Pain of Her Majesty's Displeasure, and yet if they once happen to mention *Men of Characters and Stations,* in their publick Discourses, they must be Impeach'd for it.

That it was said, indeed, That the Pulpit was not a Place for Complaints of this Nature, and these Things ought not to be spoken of in publick, unless they cou'd be prov'd; and then they ought to be prosecuted in a due Course of Law. But he apprehended it to be the Duty of a Minister of the Gospel, *to be instant in Season and out of Season, to exhort and rebuke with all Authority,* and without Distinction, and their Holy Function ought to protect them in the Performance of this Duty: But that Ministers shou'd be oblig'd to prosecute every Offender in a Court of Justice, was not yet

known to be any part of their Office, and he that shou'd take that Part upon him, wou'd hardly avoid that Imputation which many People were ready to lay upon the whole Profession.

In the next place, he said, it shou'd be consider'd if the Dangers mention'd in this Sermon were not such as had in all Ages, under the best Princes, infected the Church, and such as the pious Care of Christian Emperors, or Her Majesty's peculiar Piety and Zeal cou'd not entirely prevent under her happy Administration: But no Inference ought to be made from an historical Account, or bare Mention of such like Perils of the Church, as if it was intend'd thereby to arraign the Administration of those Princes, in whose Times they happened.

And that there are such Dangers attending the Church, even under Her Majesty's Administration, needed no other Evidence than that Form of Prayer enjoin'd, which mentions *the great Danger of the Church, by being at this Time distracted with Schism*: And it was hard if a Minister might not from his Pulpit mention those Dangers without Offence, which he was specially commanded to pray against in his Desk.

Here the Doctor's Council produc'd their Proofs of the many blasphemous and heretical Books that were printed; and first, they cited some Miscellaneous Tracts, publish'd by Mr. *Edmund Hickeringill*, and read a Passage out of *Part. 1. p. 12.*

The Managers Whereupon the Managers withdrew, and the object to the Lords adjourn'd to their House above; and being reading the return'd, Mr. *Thompson* said, they submitted it to blasphemous their Lordships, whether such impious and blasphemous Passages collected by the Council were asham'd to repeat, shou'd be republish'd in so solemn a Manner.

Dr. The Doctor's Council answer'd, That they
905. thought it very material for the Doctor's Defence, and that the Reason the Manager gave against the reading them, was the very Reason they offer'd to read them, to show the Danger of the Church from those blasphemous and impious Tenets that were so frequently publish'd.

Then

Then the Lord Chancellor directed the Doctor's They are admitted to be proper; and the Clerk read some other Passages out of *Hickeringill*, viz. p. 17, 21, 23, 50, 51, 52, 53. *Second Part*, p. 4, 14.

An Extract from the *Rights of the Christian Church*, p. 105, 108.

From *Blount's Oracles of Reason*, Preface, p. 3. *Ibid.* p. 165. lb. 49.

From Dr. Burnet's *Archæologia Sacra*, viz. *Id u- tique videtur gravissimum, & asperissimum in hac Narratione, quod gentem humanam plexisse, imo perdidisse dicatur Deus ob rem exigentiam, & fo- minilis Ingenij leuitate perpetratum.*

An Extract from a Book, entitled, *An Account of the Growth of Deism*, p. 191, 192, 193.

From a Treatise, call'd, *A Letter concerning Enthusiasm*, p. 59, 60, 61, 62, 63, 69. 906.

From a Treatise, entitled, *A brief but clear Confutation of the Trinity*, p. 9, 10, 11, 14.

Brief Notes on the Creed of Athanasius, p. 7.

An Account of the Growth of Deism, p. 17, 22, 24, 25, 26.

The History of Religion, p. 319, 312.

Asgyl's Argument, p. 36, 82, 97, 98. 907.

Christianity not mysterious, p. 80, 107, 134, 156.

Whiston's Sermons and Essays, p. 213, 215, 415.

An Extract from a Treatise, entitled, *The Unrea- sonableness of making and imposing Creeds*, p. 14, 15. 908.

An Account of the Growth of Deism, p. 25.

Then he produc'd such Papers as reflect on the Church and Clergy.

From the *Rights of the Christian Church*, p. 47, 104, 237, 240, 137, 402.

From the *Review*, Vol. 2. n. 112. p. 447, 448. Vol. 3. n. 27. p. 107. Vol. 2. n. 105. p. 418. Vol. 2. n. 36. p. 142. Vol. 6. n. 18. p. 471. *ib.* n. 93. p. 371.

From the *Observator*, Vol. 4. n. 89, 67.

Then they produc'd some Passages that reflect on the Queen and Ministry. 909.

- Out of the Review, Vol. 2. n. 80. p. 519. Vol. 3. n. 122. p. 486. Vol. 2. n. 43. p. 170. n. 44. p. 174. n. 46. p. 181. n. 27. p. 106. n. 123. p. 489.
910. From the Observer, Vol. 2. n. 89. Vol. 4. n. 97. Vol. 3. n. 15, 99. Vol. 2. n. 99.
- From the Review, Vol. 2. n. 2. p. 5.
- From a Treatise, entitled, *The Divine Rights of the British Nation vindicated*, p. 105.
- The Doctor's Council having finish'd their Proofs, as to his Defence on the third Article, the Lords adjourn'd to their House above.

Eighth Day. *Tuesday* the 7th of March.

The Court being sate, the Lord Chancellor directed the Doctor's Council to proceed in his Defence: Whereupon

Mr. Dodd's Argument for Charge contain'd in the fourth Article; and as to the Dr. on the the first part of this Article, viz. *That the Dr. fourth Art. suggests, Her Majesty's Administration tends to the Destruction of the Constitution*; he said, The Dr. denied he had made any Mention of Her Majesty's Administration, and consequently he could not argue that it tended to the Destruction of the Constitution; but on the contrary, he pray'd for her Preservation, and that she might long Reign, for the Comfort and Support of the Church, and profess'd, that what he spoke, proceeded from a tender Concern for Her Majesty, and Her Government.

As to the second Part of this Article, which charges him with suggesting, *That there are Men of Characters and Stations, in Church and State, who undermine and betray, and put it in the Power of others to overturn and destroy the Constitution*; this Charge, he observ'd, was supported by joining Passages widely distant from, and which had no Relation to one another: The Betrayers of the Constitution, to whom the Dr. refer'd, were, such as by Writing endeavour'd to subvert the Foundation of our Church and State, and such as were of a Latitudinarian Principle, &c. and not such as were pretended by the Article.

And

And as to his *Charging Her Majesty, and those* 911.
in Authority under her, with a general Male-
Administration, he abhor'd it, and had never
 said it, but always mention'd Her Majesty with
 the profoundest Duty and Respect: And he was so
 far from *endeavouring to keep up a Distinction of*
Parties and Factions, that he complains of those
 who wou'd have divided us with the knavish Di-
 stinctions of High and Low Churchmen, and prays,
we may be one Fold under one Shepherd, and that
 all invidious Distinctions might be laid aside.

As to his *instilling Jealousies, fomenting Divi-*
sions, and stirring up the Subjects to Arms, he
 was so far from encouraging these Things, that he
 had, upon several Occasions, severely censur'd them,
 and that he had, throughout his Sermon, asserted
 the Doctrine of Non-Resistance; and there was not
 any one Passage that tended to excite the Subjects
 to Arms.

And as to his *perverting Texts of Scripture, to*
make ill Impressions on the People, he had no ill
 Impressions to make; that the Story in the Second
 of Kings was indeed mistaken in the printed Ser-
 mon, but the Reflections made on that Mistake,
 were very unnatural and incredible.

Mr. Phipps, in Defence of the Dr. against the 912.
 Charge in the fourth Article, said, He cou'd not but Mr. Phipps's
 observe what Art had been us'd to make up this Ar- Argument for
 ticle: That the Dr. indeed, at p. 22. mentions Men the Dr. on the
 of Characters and Stations, but does not there men- fourth Art.
 tion Men of Characters in *Church and State*: He
 says, *There are Men of Characters and Stations,*
who shift and prevaricate with their Principles,
and start from their Religion upon any Occasion
of Difficulty: But here he charges them in their
 private Capacity, and not in any thing relating to
 their publick Administration. Nor does he menti-
 on in that place, *their weakening, undermining*
and betraying, or encouraging or putting it in
the Power of our profess'd Enemies, to overturn
or destroy the Constitution. It was at Page 15. he
 mentions this, and there he does not say any thing
 of Men of Characters and Stations, but charges

the weakening, &c. on the False Brethren in Church and State; and he thought it very hard, that a part of one Sentence, in p. 22. shou'd be brought back seven Pages, and coupled with part of another Sentence, p. 15. and put together as one Sentence, to make an Article of Impeachment: Whereas one of the Sentences had no manner of Relation or Dependance upon the other; and neither of them afunder cou'd be charg'd as a High Crime and Misdemeanor: By the same Method of transposing and altering Sentences, he said, they might have charg'd him with High Treason or Blasphemy.

But supposing it had been one entire Sentence, by *Men of Characters and Stations*, there was no Necessity that Men in the *Highest Characters and Stations* shou'd be intended: Constables, Mayors, Justices of Peace, Officers in the Militia and the Army, Officers of the Customs, and other Branches of the Revenue, were Men of Station, and some of the Stations very good ones, and many of the Persons that enjoy'd them Men of Characters, and if among these there were found some who thought it a Sin to Communicate with the Church upon any other account than to qualify themselves for their Offices and Stations, and who vilify her Orders, calumniate, misrepresent and ridicule her Priests and Professors, was it a High Crime and Misdemeanor to call such Persons False Brethren, and to suggest they were Enemies to our Constitution, and that they endeavour'd to weaken and undermine it?

913. Nor was this any Reflection on the Ministry; for it was to be suppos'd, that Men in those inferior Stations, were well affected to our Constitution, when they qualified themselves according to Law, by taking the Sacrament and Oaths, and if any of them were not so, it cou'd not be presum'd to fall under the Notice of the Ministry; and in many Cases, if they did know it, yet it wou'd not be in their Power to redress it: And this might appear, even from Her Majesty's Proclamations against Prophaneness and Immorality, where she charges the inferior Magistrates with a Neglect of their Duty,

in not putting the Laws in Execution: And was it an Offence for the Dr. to mention that in his Pulpit, which had been so often repeated by Her Majesty, under her Great Seal?

And as to the Doctor's saying, *Her Adversaries were Chief*, when he spoke of the Church; this was a Quotation of Scripture, and signified they were Mighty: But he did not apprehend it reflected on the Ministry, or Her Majesty's Administration.

As to his affirming, That those Tracts of Blasphemy, Prophaneness, Sedition and Rebellion, were publish'd *with Impunity*, he believ'd it cou'd not be denied; for that none of those bold Offenders had yet been punish'd, and that the inferior Magistrates had neglected their Duty in that Respect, they had Her Majesty's Authority for it.

As to that part of the fourth Article, which charges, *That the Dr. as a publick Incendiary, persuades Her Majesty's Subjects to keep up a Distinction of Parties and Factions*; it had been shewn, on the contrary, that he invited the Dissenters into the Church, and wish'd we might be one Fold under one Shepherd, &c. and whereas it had been objected, That tho' the Dr. invited the Dissenters into the Church, he invites them upon his own Terms: He said he hop'd they shou'd never come in upon any other Terms, than their Conforming to the Doctrine and Discipline of the Church: He hop'd he shou'd never see the Constitution of our Church weaken'd, and her Pales and Fences broken down, to let her Enemies into it.

That the Dr. was so far from *instilling groundless Jealousies, and fomenting destructive Divisions, among Her Majesty's Subjects*; that on the contrary, he rebukes and condemns those, who by false Insinuations, and raising groundless Jealousies and Fears, embroil and bring us into Confusion.

And as to the *inciting Her Majesty's Subjects to Arms and Violence*, if preaching up Passive-Obedience and Non-Resistance, was to excite Her Majesty's Subjects to take up Arms against Her, he own'd there was a sufficient Ground for the Charge,

914.

otherwise there was not one Passage in the Sermon, to warrant this Accusation.

He did admit, that the Dr. had us'd that Exhortation of St. Paul, *to put on the whole Armour of God, &c.* but this Armour did not consist of Guns, or Swords of Iron or Steel, neither were they exhorted to resist any thing, but *the Wiles of the Devil.*

But the Learned Manager wou'd have it, he did not mean Spiritual Armour, because he departed from St. Paul's Spiritual Meaning; and to make good this Charge, he us'd the same Method that was taken to make up the first part of the Article, and cites a Passage two or three Chapters before, where St. Paul says, *Let all Bitterness, and Wrath, and Anger, and Clamour, and Evil-Speaking be put away from you, with all Malice;* but how this shew'd what the Dr. meant, when he advis'd his Auditors to put on the Armour of God, he cou'd not imagine: And he did not see any thing that cou'd be collected from this Paragraph of the Doctor's Sermon, unless it were, *That they should take the Armour of God, to resist the Devil and all his Works,* which he hop'd was not a High Crime and Misdemeanor.

As for the Doctor's saying, p. 26. *Let us therefore, being well assur'd how much our Cause deserves, and how much at present it requires our bravest Resolutions, hold fast our Integrity and Religion, without wavering, and earnestly contend for the Faith which was once delivered to the Saints.* It was wholesome and Religious Advice; the more strongly and openly the Cause is oppugned, the braver Resolution it requires to defend it. The Cause of Religion was attack'd by Atheists and Deists; the Cause of Monarchy, by the Asserters of Republican and Seditious Principles; the Cause of the Church by Papists and Sectaries of all sorts; and therefore it required our bravest Resolutions, to defend the Church, the Queen, and the Constitution, with the same Zeal they were attack'd: Nor cou'd this be construed an exciting Her Majesty's Subjects to Arms and Violence.

Mr,

Mr. Dee, in Defence of the Dr. as to the Charge 915.
 in the fourth Article, said, As to the first part of Mr. Dee's Ar-
 this Article, *That he suggests, That Her Majesty's* gument for
Administration tends to the Destruction of the the Dr. on the
Constitution, the Dr. had not once mention'd Her fourth Art.
 Majesty's Ministers or Ministry in his Sermon. And
 as to the next Branch of the Article, *That there are*
Men of Characters and Stations, who are False
Brethren, and do undermine the Constitution,
and endeavour to betray the Church, &c. This,
 neither, was not to be found in any part of the Ser-
 mon. He might, indeed, charge Men of Chara-
 cters and Stations, as False Brethren, but there
 were four sorts of False Brethren describ'd by the
 Dr. viz. Those that propagate False Doctrines;
 those that give up the Discipline of the Church;
 those that are for a Neutrality in Religion; and
 those that own themselves to be of the Church, but
 live not according to her Rules: And he wish'd he
 cou'd say, there were not Men of Characters and
 Stations, who came under some of these Descripti-
 ons. But where the Dr. charges some Persons, as
 Underminers of the Church and Constitution, he
 describes them to be, either those who subvert the
 Fundamentals of Religion, as Atheists, Deists, So-
 cinians, and such like; or Occasional Conformists,
 Persons who creep into the Church only to do Mis-
 chief: And these might justly be stil'd, Underminers
 of the Church.

And whereas the Dr. is charg'd with inciting the
 Subjects to Arms and Violence, from that Passage,
viz. If honest Men will sit still, and give up their
Cause, thro' want of Courage, or a just Sense of
the dangerous Attempts of our Enemies, we may,
without the Spirit of Prophecy, foretel what will
become of our Constitution, when it is so vigo-
rously attack'd from without, and so lazily de-
fended from within. He said, the Dr. wou'd not
 have been blam'd, if it had been consider'd against
 whom he encourages the People to make this vigo-
 rous Defence; it was against those who make re-
 bellious Appeals to the People, as the only Judges
 of Right and Wrong, and the *Denier Resort* of
 Justice

Justice and Dominion: These, he said, were the fashionable Methods made use of to undermine the Church and Legislature, by breaking in upon the Prerogative of the Crown, by threatening them with imaginary Legions, and a popular Tribunal: And surely the Dr. might, without Offence, encourage the People to defend themselves against such Assailants.

916. And whether the Doctor's Exclamation, That *hard was the Lot of the Ministers of the Gospel, &c.* were not just, when such Methods had been taken to frame and piece up these Articles: When he who had never before been charg'd with Disloyalty, and was a Man of that Probity, and of so blameless a Life and Conversation, that he had not been so much as attack'd on that Account: When a Man of his Character was brought before their Lordships, for preaching the Doctrine of the Church of *England*, in the same Terms so many of the Fathers of the Church, as well as her Learned Sons, had taught it, well might he say, *hard was his Lot*, that he shou'd be made the first, and so solemn an Example; and he hop'd their Lordships wou'd be of Opinion, that the Defence of this Prosecution was a Punishment sufficient for any Crimes he was charg'd with, and of which he cou'd be suppos'd to be guilty.

Dr. Henchman's Argument for the Dr. on the fourth Art.

Dr. Henchman, as to the Charge contain'd in the fourth Article, said, That some Regard was to be had to the Declarations of every honest Man, in Relation to his own Thoughts and Intentions, and much more when a Priest of the Church of *England* does, in the Presence of God, and the Face of the Congregation, solemnly declare, that what he speaks is with a tender Concern and hearty Zeal for Her Majesty's Person and Government; no loose Words, or distant and unconnected Expressions ought to be construed to a direct contrary Sense of so express a Declaration.

As for the Doctor's having chosen an unreasonable Time and Place to preach these Doctrines; it appear'd that both Time and Place were appointed by the Magistrate: Nor cou'd it be thought unreasonable,

ble, to maintain the Doctrine of our Church, when such swarms of infamous Libels were daily publish'd, in Opposition to it. And whether the Dr. perform'd his Duty, in preaching that Doctrine which the Rubrick expressly commanded to be taught on that Day, he submitted to their Lordships: Nor cou'd it be improper, on that Day, to preach against the Sin of Rebellion, and shew that this Doctrine of Resistance of the higher Powers, first proceeded from the Papists.

That the whole charge had been supported, not by any one plain Proposition, but by Inferences and suppos'd Constructions; and he left it to their Lordships Consideration, how far an Insinuation or Inference wou'd be outweighed by an express Declaration: That it was a Rule in the Roman Law, Where-ever Words are capable of a double Construction, the Intention of the Speaker is to be attended to; and that obscure Passages were to be construed by those that were more plain and explicit; that in Criminal Cases a stricter Proof was requir'd than in Civil; that where the Life or Liberty of a Citizen were concern'd, the Proof ought to be clear as the Sun at Noon-day: And as these were Rules of Reason and Equity, and agreeable to the common Sense of Mankind, their Lordships wou'd govern themselves by them; and the last of them he mention'd with the greater Confidence, it having receiv'd the Sanction of that honourable House in Sir Samuel Bernardiston's Case, when it was declar'd, *That Inuendo's, or suppos'd Constructions, ought not to be allow'd; for all Accusations shou'd be plain, and the Crimes ascertain'd:* And he hop'd their Lordships wou'd never depart from a Precedent so well establish'd.

Then the Doctor's Council produc'd a Proclamation, dated the 26th of March, 1 Anna, 1702. *for restraining the spreading of false News, and printing and publishing of irreligious and seditious Papers and Libels.* Which was read.

Another Proclamation was produc'd and read, dated the 20th of February, 1 Anna, 1702, *For the Encouragement of Piety and Virtue,* and Pre-read.

917.

A Proclamation, against spreading false News, and publishing irreligious and seditious Libels.

918.

Proclamation against Prophaneness

Preventing and Punishing of Vice, Prophaneness, and Immorality.

919. Then the Doctor's Council propos'd that he might speak for himself, after the Managers had reply'd: But the Managers said, If he had any thing to offer, they insist'd he shou'd speak now, before the Commons reply'd; for that they claim'd it as their Right to speak last.

Dr. Sacheverel's Speech.

Whereupon Dr. *Sacheverel* said, That his Council having made so full a Defence, he shou'd not have added to their Lordship's Trouble, cou'd he have been silent where the Doctrine of the Church, the Dignity of his sacred Order, and the common Interest of Christianity were so nearly concern'd.

For altho' he was deem'd an insignificant Tool of a Party, his Trial appear'd to be of the greatest Moment, since it was design'd by that *to fix an indelible Brand of Infamy, in a Parliamentary way*, on all those who maintain the Doctrine of *Non-Resistance*; and the Clergy were henceforwards to be *directed what Doctrines they shou'd preach*.

And since he was the unfortunate Occasion of bringing these Matters in Judgment, it behov'd him to say something to clear the Innocence of his Intentions, and remove that Load of Infamy that might be laid upon him, if their Lordships shou'd be of Opinion (as he trusted in God they wou'd not) that the Articles had been made good.

He observ'd, That the Charge was very high and heinous, but then it requir'd the clearer Proof; and this had not, he said, been supported by plain, direct and express Passages out of his Sermons; but by Intendments, unnecessary Implications, and strain'd Constructions; by piecing broken Sentences and independent Passages, in order to make him speak what he never thought.

920. And he conceiv'd there cou'd not be a clearer Indication, that he was not guilty of having asserted what he was charg'd with, than that so many Hours Learning and Eloquence had been spent in endeavouring to prove it; for had he really affirm'd those Propositions, they might have been referr'd to and read, with the same Ease his Council read those

those Passages out of the Fathers of the Church, who taught the Doctrine of *Non-resistance* in much stronger Terms than he maintain'd it: That no Arguments, no Colours, were us'd to prove those Passages, because none were necessary, whereas great Art and Industry was us'd to persuade their Lordships, that such and such Assertions were contained in his Sermons. That when his Words bear a doubtful Sense, the worst Construction was made of them; and where they were plain and express, he was accus'd of meaning the quite contrary; and when he press'd the Duty of Allegiance to the Queen, it was said he meant the Pretender: That his very Silence was made Criminal, and 'twas urg'd, that he had omitted to say some Things out of Design.

That no Allowances were made to a Minister of the Gospel, discharging his Duty, whose honest, well-meant Zeal might possibly lead him into an unguarded Expression. And he cou'd not but take Notice also, that during the Course of this Prosecution, he had been stil'd a *Criminal*, and treated as such, with a Degree of Scorn and Indignity, from which he hop'd a Regard to his Sacred Profession, and this awful Judicature, might have screen'd him: But he shou'd lay aside his Complaints, and make some Observations on the Charge.

As to the first Article, he said, he had neither His Defence, expressly apply'd his Doctrine of *Non-Resistance* to as to the first the Case of the Revolution, neither had he the least Article. Thoughts of including the Revolution under his General Assertion: That he express'd this Doctrine in the same general Terms it was deliver'd by the Apostles, and the Right Reverend Fathers of our Church, and that it was perfectly agreeable to the Laws of the Kingdom: That he did not apprehend he shou'd have been Impeach'd as an Asperser of the Memory of the late King, for preaching a Doctrine which had been preach'd before Him, Her present Majesty, and the Two Houses of Parliament, with Approbation.

That this Doctrine was agreeable to the whole Tenor of the Homilies, which were establish'd by the

the Thirty-nine Articles, and those Articles, confirm'd by an Act of Parliament, which was made a Fundamental Point of the Union of the Two Kingdoms; and he left it to their Lordships Consideration, whether the condemning him for this Doctrine, might not tend to dissolve the Union.

His Defence,

As to the Second Article, he said he had no where shewn the least Dislike of the Indulgence granted by Law to the Dissenters, but declar'd his Appro-

921.

bation of it in the most express Terms; that he might, possibly, with some Warmth, have blam'd the Abuses, which Men of no Conscience made of the legal Exemption granted to *Consciences truly scrupulous*, which he did not think cou'd have drawn upon him the Displeasure of one sincere Christian, being levell'd against Hypocrites, *Socinians*, Deists, and such as under the Umbrage of that Act thought themselves at Liberty to be of no Protestant Congregation, or of any Religion at all; tho' he confess'd he had also an Eye to those Dissenters who did not observe the Qualifications prescrib'd by that Act, and who erected Seminaries for educating Youth in Principles opposite to those of the Church of *England*; whereas that Act was intended for the Ease of those, whose Minds were by an unhappy Education already estranged from the Church, and not (as he conceiv'd) to indulge Men in taking the most effectual Methods to propagate and perpetuate their Schism.

Nor did he think he had betray'd any want of Christian Moderation, in affirming that this Act which reliev'd some Dissenters from legal Punishments, had not alter'd the Nature of Schism, or extinguish'd the Obligations to Church-Communion; that the Guilt of Schism might still rest upon their Souls, however it ceas'd to affect their Bodies and Estates: Human Laws cou'd not make that void, which God had commanded.

That he did not in Terms maintain, That it was the Duty of superior Pastors to thunder out their Anathemas against Persons entitl'd to the Toleration, nor did the Connexion of his Discourse require that

that Sense, or easily admit it: That when he spoke of those Censures, he mention'd Men of lewd and immoral Practices, Heresies and Blasphemies, of which a black Catalogue had been display'd before their Lordships, and Anathema's wou'd be well employ'd against such Persons, and he doubted not wou'd be ratified in Heaven, and therefore wou'd by any Power on Earth be irreversible.

As to Archbishop *Grindal*, he thought he had good Authority for what he charg'd him with, but whether that glorious Princess Queen *Elizabeth* or he, shou'd bear the Blame of his Disgrace, he submitted to their Lordships.

As to the third Article, he said, altho' he had His Defence, not suggested, nor did believe the Church to be in as to the third Danger from Her Majesty's Administration; he hop'd he might say it was in Danger from other Causes, for besides that Deluge of Prophaneness and Immorality that overspread the Kingdom, and those Heresies and Schisms that weaken'd and divided us, never were the Ministers of Christ so abused and villified, the Divine Authority of the Scriptures so arraign'd and ridicul'd; never were Infidelity and Atheism so impudent and barefac'd, from the Foundation of Christianity to this Day; and he hop'd their Lordships wou'd pardon him, if the Apprehension of the sad Consequences of such crying Abominations had forc'd from him some Expressions which upon a less Occasion might seem too harsh and vehement: And might he become an Instrument of putting a stop to that Overflowing of Ungodliness and Blasphemy, which as yet no Laws or Proclamations cou'd restrain, he shou'd think himself happy, whatever might befall him.

Nor might he forget, tho' it was forgotten by the Managers, another Danger mention'd in his Sermon, arising to the Church, from *Popish Emissaries*, who swarm'd about this City in Defiance and Contempt of the Laws: This he had not been call'd upon to prove, nor had it been reckon'd among his false Insinuations of the Church's Danger: He pray'd God the Church might be in no Danger on any of these Accounts; but he hop'd he did not exceed the Limits

Limits of his Function, if when he was call'd to preach before Magistrates, he exhorted them to prevent those Dangers, by putting the Laws in Execution.

And just, he said, wou'd have been the Indignation of the Commons, and their Lordships Resentments, if he had attempted a Parallel between the Vote of the Two Houses, as to the Safety of the Church, and the Vote about the King's Safety: But he thought he had sufficiently purg'd himself of this, by observing, that the Parallel ascrib'd to him implied, that those who Voted King *Charles* out of Danger, and those who conspired his Death, were the same Persons; whereas it was very certain they were not: For the Vote about the King's Safety was pass'd by the Lords and Commons a Year and pass'd but 3 half before the King's Murther; which was perpetrated by a pretended Ordinance of a small Remnant of the House of Commons, when the rest were imprison'd and secluded, and without the Concurrence of the Peers; and therefore he cou'd not possibly mean by any odious Parallel to insinuate, that the Members of Both Houses, who pass'd the Vote concerning the Safety of the Church, were then conspiring its Ruin.

Mr. Thompson
says that Vote
was pass'd but 3
Months before the
King's Death.

His Defence,
as to the
fourth Art.

As to the fourth Article, the Commons had not shewn what Minister of State he had reflected on, directly or indirectly, or where he had by any Suggestion, charg'd Her Majesty, or those in Authority under her, with a general Male-Administration, or perswaded Her Subjects to keep up a Distinction of Parties and Factions: And it was plain he had, on the contrary, reprov'd those who divided us by knavish Distinctions, perswaded his Fellow-Subjects to forget them: Nor was his preaching up the Illegality of Resistance on any Pretence, consistent with the Charge of stirring up the People to Arms and Violence.

Indeed a Manager had offer'd his charitable Assistance, to reconcile this Inconsistence, and had done it, by supposing his Doctrine of Non-Resistance was design'd in Favour of the Pretender, and so might be very consistent with his stirring up the People

People to Arms and Violence, against the Queen : But he call'd God to Witness, that he utterly detested any such Traiterous Intentions ; and had he cast so black and groundless an Imputation upon another, who had given all possible Evidence of his Duty and Affection to the present Government, he shou'd be unworthy the Name of a Christian : And how true a Zeal and Affection he bore to Her Majesty's Person, and the present Government, he desir'd Leave to show, by repeating several Passages out of his own Works in Print : [*Here he repeated abundance of Expressions, dispers'd in his Sermons, full of Duty and Respect to Her Majesty, and of Affection to the Constitution :*] And these, he said, he conceiv'd wou'd sufficiently declare his Innocence, and refute the Charge contain'd in this Article.

He said he had upon all Occasions asserted these Principles of Loyalty and Subjection to the Supreme Power ; and this *Magdalen-College*, whereof he was an unworthy Member, (and which had contributed as much towards the late happy Revolution, as any Society in the Kingdom) cou'd testify ; and he wou'd appeal also to a Right Reverend Lord upon the Bench of Bishops, for the same Character.

That, if it was necessary, he cou'd produce numerous Evidences of his hearty Affection to the present Government, from the Gentlemen he had bred up, and the Congregations to which he had preach'd : And had his Principles any Tendency towards Disloyalty, some favourable Expressions towards the Pretender, some Indications of his Dislike to the present Settlement, and the Protestant Succession, surely wou'd have been shewn, in order to have made good this Charge of Sedition against him : And it was with Pleasure he observ'd, that from the whole Course of his Actions, no one Instance of this Kind was pretended to be given.

If he was guilty of *wickedly wresting the Scripture*, as had been charg'd, there was another Tribunal, to which he was accountable for it ; but in the mean time he hop'd, that those whose particu-

lar Profession and Studies qualified them to be the most competent Judges of these Matters, wou'd absolve him in this Particular.

And upon the whole, he hop'd he might apply to his own Case, the Words of that blessed Apostle, whose Doctrine he defended, *viz. Neither against the Law, nor against the Temple, nor against Cæsar, have I offended any thing at all.*

What he had hitherto offer'd, he said related to his Words and Actions; and as to the Thoughts and Intentions of his Heart, he call'd the Searcher of Hearts to witness, in the most solemn and religious Manner, that he had no such *wicked, seditious, or malicious Intentions*, as he was charg'd with: That he had no *Intention to asperse the Memory of his late Majesty, to traduce or condemn the late happy Revolution, or to arraign the Resolutions of both Houses of Parliament*; and he was so far from designing to undermine and subvert Her Majesty's Government and the Protestant Succession, that it was his sincere Intention to exert his best Endeavours for their Security, to persuade the People to lay aside all Distinctions, and be obedient to their Governors, and he was from the bottom of his Soul zealously and affectionately loyal to Her Majesty, and persuaded that the Church was in no Danger from her.

And altho' his Discourse did not lead him to speak of the Protestant Succession in that Sermon, he gladly took this Opportunity of declaring, that it was his sincere and hearty Prayer, that God wou'd prolong the Life of Her Majesty, and that her Reign might exceed that of her renowned Predecessor, Queen *Elizabeth*, in Length as well as Glory; but when the Inheretrix of the blessed Martyr's Crown and Piety shou'd, full of Years and Honour, be gather'd to her Fathers, and exchange her Temporal for an Immortal Crown (since we were depriv'd of that Prince, her Royal Offspring, whose Loss was inconceivable) he earnestly besought God, in Default of future Issue of Her Majesty, to perpetuate the Succession of the Crown, as it was establish'd in the Most Illustrious House of *Hanover*,

He calls God to witness the Innocence of his Intentions.

Q.

924.

He prays for Her Majesty, and the Protestant Succession.

Hanover, which he look'd upon, next to Providence, the best Guard we had against Popery and arbitrary Power.

And how the Doctrine he preach'd tended to weaken this Establishment, or how the Doctrine of Resistance, which brought Her Majesty's Royal Grandfather to the Block, came now to be press'd and inculcated as a *necessary indispensable Duty*, under the most mild and gracious Administration of the best of Queens, he cou'd not imagine.

For his part, he was so far from having any malicious or seditious Designs, that his Intentions were to instil Principles of Loyalty and Obedience into the People, and withal, to put a stop to that Torrent of Lewdness, Irreligion and Atheism, of which he had given their Lordships such flagrant Testimonies.

Those outrageous Insults upon God and Goodness, he said might excuse some Heat and Severity of Expression, in a Minister of Christ, (who, tho' Meekness itself, cou'd not but show the utmost Indignation at the prophaning the House of God.) Nor was this to rail, but to rebuke, and those who ridicul'd or censur'd them for it, had not a right Notion of the Dignity of their Office; they did not consider them as the Ambassadors of Christ, who were commanded, in his Name to *Exhort and Rebuke with all Authority*, and that their Authority was derived from him who said, *He that despiseth you, despiseth me, and he that despiseth me, despiseth him that sent me.* That if any Expressions, therefore, had slip'd from him, which might seem to carry a Sense he never intend'd, (as he must be a happy Speaker, whose Words were unexceptionable) he hop'd such Provocations might plead his Excuse, at least, that they shou'd not be deem'd High Crimes and Misdemeanors; especially since he cou'd have no Temporal Interests to serve by these Doctrines.

And he humbly hop'd, that what he had already suffer'd as a suppos'd Criminal, wou'd be thought Punishment sufficient: That it was no small Affliction to lie under so heinous a Charge, tho' he

925. shou'd be acquitted: It must cast a Blemish upon his *Holy Character*, and leave a Scar upon his *Good Name*, which was to all Men dear, but much more so to those, whose whole Capacity of doing Good in the World depended upon it.

That as the Matter of his Charge was highly criminal, it was couch'd in such general and uncertain Terms, as made it almost impossible to defend himself: That he had been under a long and close Confinement, and been put to an Expence very unproportionable to his Circumstances; and he look'd upon it not as the least of his Sufferings, that he was debarr'd from taking care of his Flock, *over which the Holy Ghost had made him Overseer*; for since he had been admitted to Bail, he was forc'd to avoid appearing in Publick, lest it shou'd occasion a Tumult, as his Attendance on their Lordships had been thought unhappily to have done, tho' without any Encouragement from him, and which he profess'd, in the Presence of God, he abhor'd.

These Circumstances consider'd, as also his standing before so august a Judicature, from Day to Day, to hear himself revil'd, and represented as a Papist in Disguise, as a Rebel, and Enemy to Her Majesty, and a Favourer of the Pretender, tho' he had abjur'd him, and consequently charg'd as the worst of perjur'd Villains. To be call'd an *insignificant Tool of a Party*, on one hand, and a *dangerous Incendiary*, on the other, nay, an Angel, that is, a *Devil, detach'd from the infernal Regions*; he shou'd not escape without being a considerable Sufferer, tho' their Lordships shou'd acquit him. Yet he cou'd not but reflect with Comfort, that he answer'd for himself before the most illustrious Assembly in the World, the whole Body of the Nobility of *Great Britain*, who were not to be sway'd by Hope or Fear, nor misled by any false Prejudice or Passion, but wou'd decide his Cause with the strictest Impartiality, Equity, and Honour.

And when he consider'd he was judg'd for a Doctrine receiv'd from the Apostles of Christ, one of those Eternal Truths, which their Lordships the
Bishops

Bishops were solemnly commissioned to teach, and earnestly contend for, which the primitive Martyrs maintain'd, even in the midst of Flames, and so many Bishops and Confessors recommended to Posterity in their Immortal Writings, as the distinguishing Badge and Glory of the Reformation: And which my Lords the Bishops had themselves supported with incontestable Reason and Authority. It was no small Satisfaction, that my Lords the Bishops were to be his Judges, and he hop'd they must be his Advocates: For what Guilt, as well as Disgrace, must it devolve upon the Clergy, to recede from a Principle of our excellent Church, so long retain'd and boasted of as her peculiar Character! by abandoning which they must relapse into the worst of Popish Doctrines, and render themselves the most contemptible, as well as inconsistent Church in the World.

That it was a Doctrine, which the Clergy were oblig'd, both by Subscription and Oath, to avow and defend, and how hard were their Circumstances, if they must be punish'd in this World, for doing that, which if they did not they must be more heavily punish'd in the next: Then might they truly say, *If in this Life only they had Hope in Christ, they were of all Men most miserable.* But justly, he said, might they be reproach'd, and seem to deserve the Censures so plentifully pour'd upon them in these licentious Times, were they not ready to practice the Doctrines they preach'd; and for his part, *he was not only ready to be bound but to die*, cou'd he by that do Service to the Queen, his Church, and Country, *neither did he count his Life dear, so that he might finish his Course with Joy, and the Ministry he had receiv'd of the Lord Jesus*; and he pray'd God so to direct their Lordships, that thro' him a Wound might not be given to the Doctrines of the Scriptures, and the Church of Christ.

But, whether he was acquitted or condemn'd, he said he shou'd always pray for the Queen his Sovereign, their Lordships his Judges, and the Commons his Accusers, and concluded with beseeching

The TRIAL of

God to deliver them all from false Doctrine, Heresy and Schism, from Hardness of Heart, and Contempt of his Word, from Envy, Hatred and Malice, and all Uncharitableness.

Then the Lords adjourn'd to their House above.

Ninth Day. *Thursday*, the 9th of *March*,
9 *Anna* 1709.

The Court being sat, and the Dr. appearing with his Council, at the Bar, the Lord Chancellor directed the Managers to proceed in their Reply, and accordingly,

Sir Joseph Fekyl's Reply to the Doctor's Defence, as to the first Art.

Sir Joseph Fekyl enter'd upon the Reply to the Doctor's Defence, as to the first Article.

And first he takes Notice of the Concessions made by the Doctor's Council, viz. That *Necessity* creates an Exception to the General Rule of *Submission to the Prince*: Secondly, That this Exception is understood or implied in the Laws that require such Submission: And, Thirdly, That the Case of the Revolution was a Case of Necessity: He said these Concessions fully answer'd the Commons Meaning in this Article, and he cou'd not forbear congratulating them upon the Success of their Impeachment, that in full Parliament this erroneous Doctrine of unlimited Non-Resistance, was given up and disclaim'd.

But he appeal'd to their Lordships, whether these Concessions were not a total Departure from the Doctor's Answer, wherein there was not a Word that look'd that way: But he does there *aver that the Illegality of Resistance on any Pretence whatsoever, to be the true Doctrine of the Church of England*, without adding *any Restriction or Limitation*, but now he saw he was in Danger of being punish'd, and that he or the Revolution must be condemn'd, he was prevail'd with to *tolerate* his Council to make these unwilling Concessions.

But since it was very probable, when his Turn was serv'd, he wou'd retract these Concessions, and
927. urge this very Argument of Necessity, as an Excuse for making them, and since the Dr. himself did not expressly

expressly come into these Concessions, they ought not to avail him.

He said, he did readily agree, that no strain'd Inuendo's, or forc'd Constructions ought to be admitted, to prove the Dr. Criminal; nothing but express Words, or a necessary Implication from a Man's Words, cou'd make him an Offender, but express Words of Scandal were not always necessary; indirect or oblique Scandal had ever been met with and punish'd in the ordinary Courts of Justice, otherwise the Subtilty and Contrivance of it, which aggravated the Offence, might prevent the Punishment; and therefore ironical Scandal, and even dumb Scandal, by Signs or Pictures, [5 Co. Rep.] was punishable by Law. The only Caution necessary in those Cases was, that the Construction was not strain'd or forc'd.

Express Words not necessary to denominate a Writing libellous. Indirect or oblique Scandal, or by way of Irony, punishable.

As to the first part of the Charge in this Article, viz. The Assertion of the utter Illegality of Resistance, upon any Pretence whatsoever, he observ'd it had been said in the Doctor's Defence, that the Dr. meant this of the Supreme Legislature, and not the Supreme Executive Power; but he said the contrary appear'd from the Account he gave of those who oppos'd this Principle of Non-Resistance, viz. As cancelling their Allegiance, calling their Sovereign to Account, dethroning and murdering him, &c. but principally from his bringing in the Case of the Revolution, as urg'd by those who oppos'd his Principle of Non-Resistance; for the Revolution cou'd not be urg'd as an Instance of the Lawfulness of Resisting any Thing but the Supreme Executive Power; and therefore this must be the Supreme Power he affirm'd it utterly unlawful to Resist.

Then he observ'd, it had been urg'd, that the Dr. only asserted the Illegality of Resisting the Supreme Power, in all Things lawful; These Words, he admitted were in the Sentence, but said, they were relative to his Assertion concerning Active Obedience, and not Passive, as wou'd appear upon reading the whole Sentence; the one was restrain'd, the other was unlimited; and it must be taken there-

fore that the Dr. asserted the utter Illegality of Resistance to the Supreme Executive Power, *tho' acting in Contradiction to the Laws.*

As to what had been said in Defence of that Assertion, of the Parliament's disowning the Resistance at the Revolution, *by declaring they set the Crown on the King's Head, on no other Title, than the Vacancy of the Throne;* he desir'd to observe, that the same Act takes notice of the Male-Administration of King James, and his abdicating the Government, as the Means by which the Throne became void, and he appeal'd to the Journals of both Houses, if the Word *Abdicated* was not insisted on by the Commons, and us'd rather than the Word, *Deserted*, because it included in it Male-Administration, which the Word *Deserted* did not.

That as to the Act, *For preventing vexatious Suits*, which was urg'd by the Commons as a Parliamentary Declaration, justifying the Resistance us'd at the Revolution, it had been said by the Doctor's Council, that it was no more than an Act of Indemnity for those that assisted in it; but this
 §28. was no Answer to the Declaratory Part of that Law, which says, That those Acts of Resistance were necessary, and ought to be justified.

As to the second Branch of this Article, *viz. The Doctor's Assertion, That his late Majesty disclaim'd the least Imputation of Resistance,* he observ'd, his Council wou'd have it, that he meant Conquest, and that because the Prince of Orange cou'd not be said to Resist, according to the common Understanding of the Word, he being no Subject, but a Sovereign Prince: But tho' he wou'd not be said to disclaim Resistance for himself, he might for those who join'd with him; and it was plain the Dr. spoke of the Resistance of those who join'd with him, and not his own Resistance. Nor wou'd the Passage quoted from his Sermon avail him, *viz. The Parliament burnt a Libel that wou'd have pleaded the Title of Conquest, by which Resistance was suppos'd;* for he himself had distinguish'd between Resistance and Conquest: And for the Dr. to pretend the King disclaim'd Resistance, at a Time when he was exhorting

horting the Subjects of King *James* to Resist, and was joining with them; nothing cou'd be a greater Reflection upon his late Majesty, or the Glorious Cause he had then in Hand.

As to the third Branch of the first Article, viz. His asserting, *That to impute Resistance to the Revolution, was to cast black and odious Colours on his late Majesty, and the Revolution*, which was supported by that Passage, *Our Adversaries think they effectually stop our Mouths, and have us sure and unanswerable on this Point, when they urge the Revolution of this Day in their Defence.* Altho' this was said to relate to those new Preachers, and new Politicians, who taught Antimonarchical Principles, it was plain from the Doctor's Reply to these Adversaries, it cou'd only relate to the Point of Non-Resistance before asserted, and which Resistance, if it were not denied, must stand condemned by the Doctor's Proposition.

And tho' there were twenty or thirty Lines between the general Proposition and this Clause, if there was a Connection between them, it was sufficient. 929.

And altho' the Learned Civilian thought he had found an Exception, at the 10th Page, if he had read a little further, he wou'd have found this Passage, *And whosoever singly, or in a private Capacity, should attempt it, [i. e. any Innovation in the Constitution] is guilty of the highest Misdemeanor, and is an Enemy to that Politick Body of which he is a Member.* If this Passage respected the Revolution, then the Dr. condemn'd all that assisted in it, which was the Thing he was charg'd with: But if the Dr. instructed his Council to insinuate there was any Innovation in the Constitution, wrought by the Revolution, that was an Addition to his Crime: For the Revolution did not introduce any Innovation: It was a Restoration of the fundamental Laws of the Kingdom.

His other Council, indeed, did not think the Exception ought to be made; If the Exceptions were to be stated, it wou'd, in Time, devour all Allegiance, they thought: But he said there was a Difference

rence between putting of Cases of lawful Resistance, and excepting the Resistance at the Revolution out of his general Rule, on a Day when he was not only oblig'd to commemorate the Revolution, but the Resistance us'd to bring it about, as appear'd in the Service appointed for that Day. And he took notice of his Insolence, in representing the Commons, as calling upon Divines to state the Cases where Resistance was lawful, and where not, as promoting Anarchy and Confusion.

And what a Representation, he said, had the Dr. given of that glorious Transaction, the Revolution! as if the Subjects concern'd in it had acted contrary to the express Command of God, and as if his late Majesty had encourag'd this pernicious Wickedness, and disown'd it at the same Time; he shou'd therefore, he said, in Behalf of the Nation, and the Memory of his late Majesty, set this Matter in a true Light.

And, *First*, he observ'd, how miserable the Nation must have been, if the late King had not with his Army join'd the Subjects of this Kingdom, who took up the Arms of Resistance: And shew'd, that the best and happiest Nations had ever been most tenacious of their Liberties, and while they continued so, and withstood absolute Power, they appear'd very considerable; but when they fell from those Principles, which were the Foundation of their Prosperity, they soon dwindled into nothing, and therefore he conceiv'd it cou'd not be said with any Colour, that Resistance, in Cases of extreme Necessity, had worse Consequences, than unlimited Subjection.

As to the Part the late King had in the Revolution, he undertook a most hazardous Enterprize, to make us happy, and with great Care and Anxiety labour'd to secure that Happiness to us, to the last Moment of his Life.

And as to the Sense of the Nation, on the Point of Resistance, it might be gather'd from the Satisfaction the Nation discover'd, on Queen *Elizabeth's* assisting the once oppress'd *Provinces*, our now potent Allies; in the Assistance given by King *James I.*

to the Prince *Palatine*, against the Emperor his Superior Lord; the Assistance given by King *Charles* to the *Rochellers*; and that her present Majesty afforded the *Spaniards*, against a Prince they had recogniz'd; and the Assistance she gave the *Cevennes*, against their King exercising a cruel Dominion over them; these, he said, were so many Authorities against this Doctrine of Unlimited Non-Resistance.

As to the Acts of Parliament cited by the Doctor's Council, as countenancing this Doctrine of Non-Resistance, he said he shou'd consider them under Three Heads: *First*, Those before the Restoration. *Secondly*, Those between the Restoration and Revolution. And, *Thirdly*, Those after the Revolution.

As to those before the Restoration, he said, 'twas true, they did condemn Resistance generally without mentioning any Exception, but the Doctor's Council had furnish'd him with an Answer to this, *viz. That the Exception was imply'd*: Nor cou'd it be suppos'd, that the Legislators intended, by these Acts, to make all other Laws invalid, as they must be, if absolute Power cou'd not be withstood.

He admitted, that the Acts made between the Restoration and Revolution, went yet further, and seem'd so to condemn all Resistance, as to exclude any Exception whatever: But it ought to be consider'd, that the Legislature were then guarding against those pernicious Antimonarchical Principles, which had a little before overturn'd the Constitution, when the Regal Rights were swallow'd up under Pretence of Popular ones: And they did not then foresee a quite different Case, as was that of the Revolution, when under pretence of Regal Authority, a total Subversion of the Rights of the Subject, was almost effected. And it cou'd never be inferr'd, that it was the Intention of the Legislature to condemn Resistance in a Case of absolute Necessity, for preserving the Constitution, because they were guarding against Principles which had so lately destroy'd it.

But

But by the Acts pass'd since the Revolution, the Resistance then us'd was not only approv'd in express Terms, but the Declaration concerning the Unlawfulness of taking up Arms against a King was repeal'd, by the 1 W. and M. for after the Militia Act, and the Act of Uniformity are mention'd, then follow these general Words, *Any Law or Statute to the contrary notwithstanding*; which include the Corporation Act also, tho' it be not particularly specified in that Act of the 1 W. and M. for *abrogating former Oaths*, and this Opinion, he said, had universally prevail'd, for otherwise most Corporations wou'd be dissolved by the Incapacity of their Members.

And as to what the Doctor's Council had urg'd, That tho' this Declaration was repeal'd, yet that did not make the Proposition false, which had been sworn by Men of all Degrees: He said this was true, with an Exception of Cases of Necessity; and he did admit it was not repeal'd, because it was false, understanding it with that Restriction, but because it might be interpreted in an unconfined Sense, exclusive of that Restriction, and so might reflect on the Justice of the Revolution; and the Legislature intended, by Repeal of that Declaration, to give a Parliamentary Admonition against asserting this Doctrine of Non-Resistance in an unlimited Sense.

He said he did not expect to hear the Association or Abjuration-Oath mention'd as supporting this Doctrine of Non-Resistance, nor did they oblige to any thing more than the Oath of Allegiance, unless it were that the Person taking them declar'd the Prince to be *rightful and lawful King and Queen*.

No Man can And this indeed put the conscientious Taker on consider the Ab- sidering on what Foundation their Right and Title juration-Oath were built: And since there was no Foundation for who does not it but the Revolution, and that Revolution was hold it lawful founded upon Resistance; he cou'd not imagine how to Resist the Persons who believ'd that Resistance to be unlawful, Prince for cou'd bring themselves to take the Association or Male-Admi- Abjuration-Oath. And he added, That these Acts nistration. made since the Revolution, did affirm that indefea- sible

ible Inheritance which the People had in the Laws.

As to the Subscribing the Thirty-nine Articles, which approv'd the Homilies, the Subscriber cou'd mean no more, than that the Doctrine therein contain'd was generally true, for the Practice of the Church was directly contrary to them in some Points, and particularly, where they condemn the Use of Organs.

That the Compilers of them only intended the Doctrines of Submission therein contain'd, against those plausible Pretences then made use of by the Popish Faction, to incite Insurrections: And Queen *Elizabeth*, in whose Reign part of them were compil'd, sufficiently explain'd her self, in that Assistance she gave the *Hollanders*, against the King of *Spain* their Sovereign, and the Clergy in Convocation, as well as the Parliament, explain'd their Meaning, by the Supplies they gave the Queen for that Service.

As to the other Authors cited by the Dr. and his Council, the Case of Resistance for the Preservation of Church and State, had not been put and condemn'd by any of them, unless in Bishop *Sanderson*, and the *Oxford* Decrees: And if so Great and Good a Man as the Bishop had fallen into those shocking Expressions, on that Subject, it ought to have discourag'd others from delivering that Doctrine in such a Latitude: And as for the *Oxford* Decrees, he observ'd, they had taken upon them also to assert, *That it was not lawful to preclude the next Heir from his Right of Succession to the Crown*, tho' by the 13th of *Eliz.* it was made High Treason, to affirm that the Legislature cou'd not limit the Succession of the Crown: And the Laws for settling the Succession in the Protestant Line, did also sufficiently confute that Assertion: And since so great and learned a Body, had so criminally err'd in these Points, it ought to deter particular Divines from pretending to determine Points of Law and Policy.

That the University of *Oxford* having fallen in so heartily with the Revolution, was a sincere Retraction,

traction, and Condemnation of this Doctrine of Unlimited Non-Resistance, and their taking the Abjuration-Oath, a publick Profession, that a Parliamentary Exclusion was lawful. And as to the Passages that had been read out of other Books, in Favour of Non-Resistance, their Reasons did not reach so far as where the Mischief was Universal; and tho' a Passage had been cited to countenance it, out of the Bishop of *Sarum*, there was in the same Book an exprefs Exception, where Fundamentals were subverted; and the Doctor's Candor in this and many other Instances, towards that Prelate, he observ'd was very conspicuous; and as the Bishops Services at the Revolution, wou'd never be forgotten by one part of the Nation, so he said he perceiv'd they wou'd never be forgiven by the other.

That the Bishop of *Lincoln* expressly mentions the Revolution, and justifies the Resistance then us'd, and the Archbishop of *Tork* had shewn, *That as the Laws of the Land are the Measures of our active Obedience, so are also the same Laws the Measure of our Submission; and as we are not bound to obey, but where the Laws and Constitution require our Obedience, so neither are we bound to submit, but as the Laws and Constitution require our Submission.* And this, he said, was the Doctrine the Commons were maintaining, and calling this Criminal to Account for contradicting.

And it was observable also, he said, that the same Archbishop blames our Divines, for taking upon them, *to adjust the Limits of the Prince's Prerogative, and the Peoples Liberties;* and tells them, *It was usurping an Office that belong'd to another Profession, and that 'twas as indecent for a Clergyman to deal in these Points, as to determine Titles of Land in the Pulpit, which were controverted in Westminster-Hall.* And how well the Dr. had observ'd this Caution, he submitted to their Lordships, who, notwithstanding the unanswer'd Performances of many of the Clergy and Laity, in Behalf of the Revolution, and this Doctrine of *Resistance*, had the Boldness to affirm,
That

That the Doctrine of *Non-Resistance*, was the Doctrine of our Blessed Saviour and his Apostles.

That his being a Minister of the Gospel, his taking the Oaths, and being a Fellow of that College which was in a particular Manner deliver'd by the Revolution, were so many Aggravations of his Guilt: And as their Lordships had the Care and Concern of Dr. *Sacheverel*, on one side, so they had the Prosperity of a wise and brave Nation on the other, who as they had thought nothing too much to hazard, to defend their Liberties against a *Foreign* Enemy, so they hop'd their Lordships Justice on this Offender wou'd secure them against *Domestic* ones.

Mr. Sol. Gen. being also appointed to reply to *Mr. Solicitor's* the Defence that had been made upon the first Article, he said, The Commons having so fully prov'd the Assertions charg'd upon the Dr. by this Article, they little expected to have heard that his Words had been wrested to wrong Meanings, and made to speak what he never thought, and therefore since the Question depended altogether upon Construction, he shou'd take leave to read the Passage on which the Charge was founded. [Which he did, *in hæc verba.*] *The grand Security of the Government, and the very Pillar upon which it stands, &c. unto that infamous Libel that wou'd have pleaded the Title of Conquest, by which Resistance was suppos'd.*

And the Question, he said, was, Whether by these Words the Dr. had not asserted, That his late Majesty, in his Declaration, disclaim'd the least Imputation of Resistance, and that to impute Resistance to the Revolution, is to cast black and odious Colours upon his late Majesty and the Revolution? Now that there was a Resistance at the Revolution, and that such a Resistance was lawful, in a Case of absolute Necessity, he observ'd had been admitted by the Doctor's Council; but they wou'd excuse the Dr. by saying, he had asserted nothing to the contrary, for the Resistance he affirm'd the King to have disclaim'd, was only a Resistance that tended to Conquest: But he observ'd, there was

was no previous Discourse of a Title by Conquest, that cou'd give Occasion for his vindicating the late King from any such Imputation, or to which the Words cou'd in any Constrution be applied, for the Dr. said nothing of Conquest, till after he had asserted, That the King disclaim'd the least Imputation of Resistance.

And whereas it had been urg'd by the Doctor's Council, That he was not speaking of the utter Illegality of Resistance, when he enters upon his Discourse about casting black and odious Colours, but of the damnable Positions with which he charges the new Preachers, and new Politicians, in the Words immediately preceeding: Upon stating the whole Paragraph, the Commons thought it wou'd manifestly appear, that what the Dr. said about casting black and odious Colours on the Revolution, cou'd only be applied to those who maintain'd, that the Resistance us'd at the Revolution was lawful and just; for *the Point* which he says his Adversaries thought they had him sure and unanswerable upon, must be some one single Position mention'd by him before, and not many; for 'twas, *this Point*, not, *these Principles*; and that single Point cou'd be no other than the Point of Resistance, and *his Adversaries*, those who deny his general Doctrine, and not those new Preachers and new Politicians, who say the People have a Power vested in them, to cancel their Allegiance at Pleasure: For it cou'd never be inferr'd from the Lawfulness of Resistance, at a Time when a total Subversion of the Government was intended, That People might take Arms, and call their Sovereign to Account at Pleasure.

935. He said, The Dr. was not impeach'd for preaching the general Doctrine of *Non-Resistance*, as his Council suggested, but for preaching against an excepted Case, after he had stated the Exception; and this was not preaching the Doctrine of Non-Resistance in the general Terms us'd by the Apostles and Fathers of the Church, where Cases of Necessity might be understood to be excepted by a tacit Implication, as his Council allow'd; but 'twas preach-

preaching directly against the Resistance us'd at the Revolution, and must be design'd to bring an Odium upon the Revolution, and those who were concern'd in it; he wou'd otherwise have shewn, that the Resistance us'd at the Revolution, was absolutely necessary, and the only Means left to revive the Constitution; but instead of this, he denies there was any Resistance in the Revolution, and says, *they are the greatest Enemies to it, who cast such black and odious Colours upon it.*

And tho' it had been urg'd, That the Supreme Power was not resist'd at the Revolution, for that the Lords and Commons join'd with his late Majesty in bringing it about; yet he observ'd, 'twas plain from the Doctor's applying the Illegality of Resisting the Supreme Power to the Case of the Revolution, that he meant the Executive Power, which was then resist'd; and in the same Paragraph, he speaks of calling the Sovereign to Account, and of cancelling Allegiance at Pleasure, which was due only to the Prince, and therefore no other cou'd be intended.

That the Resistance us'd at the Revolution, having been admitted to be consistent with the Doctrine of the Church, and the Laws of this Kingdom, he said it was unnecessary to say any thing upon that Head; and if the Books from whence the Dr. had taken the Passages that were read, were examined, 'twas possible some Expressions might be found to shew that the Authors never intended that their general Rule should extend to Cases where the total Subversion of a Government was aim'd at; as appear'd in the Book call'd, *A Vindication of the Church and State of Scotland*, where the Author affirms, That in Case of a total Subversion, the Supreme Power might be administred by another; which shew'd that that Reverend Prelate, who was so instrumental in the Revolution, did not act in Contradiction to his former Sentiments.

That it had been urg'd, That the Dr. cou'd never mean any Service to the Pretender, having asser'd the Queen's Hereditary Right, styling her, *The good and pious Relict of the Royal Family*; but he

thought this Expression cou'd carry no such Meaning, there being other Branches of that Family still remaining; and tho' the Doctor's Council wou'd turn it upon the Commons, as if they denied her Hereditary Right (which they shou'd ever avow) they did not think that inconsistent with a Parliamentary Title, and their asserting she had such a Title, was not to make way for the Pretender, but to shew that he was effectually and legally excluded, and that Her Majesty had not only an Hereditary Right, but the Sanction of an Act of Parliament, which had always been thought sufficient to bind the Succession of the Crown, notwithstanding the Oxford Decrees, on the Authority of which University the Dr. so much relied.

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And whereas it had been said the Dr. cou'd have no seditious Intention, in preaching up the Doctrine of the utter Illegality of Resistance, he thought in the Manner he had manag'd it, he cou'd not take a more proper Course to incite the People to Sedition, and to create Discontents. He had asserted, That the Resistance us'd at the Revolution, was odious and illegal; he charges Her Majesty, and those under her, with a general Male-Administration, from whence the People must infer, that the Government is ill founded, and no Obedience due to it, and that 'tis their Interest to get rid of it as soon as they can.

And his Intentions being apparently seditious, his having taken the Oaths, &c. were but so many Aggravations of his Guilt.

As to the Complaint the Dr. made, of his being prosecuted in this Manner, it was sufficiently answer'd by his own Council, who acknowledg'd it to be a Cause of very great Moment, and that the Points under Debate were proper only to be settled in Parliament: And when the Foundations of the Government, in Church and State, were struck at, Her Majesty's Title endeavour'd to be weaken'd, and her Administration vilified and expos'd, in the most audacious and insolent Manner, where, he said, cou'd the Commons apply for Justice, or expect an adequate Remedy, but in Parliament?

Mr.

Mr. Lechmere's Province being to make Observa-
 tions on some Passages that had fallen from the Do-
 ctor's Council, he said, the Gentleman who began
 his Defence, had admitted, that if the Dr. had as-
 serted the utter Illegality of Resistance, on any
 Pretence whatsoever, and had declar'd that the
 Revolution ought not to be excepted out of that ge-
 neral Rule, as was charg'd, no Punishment cou'd be
 too great for him; but that 'twas one thing expressly
 to affirm the Revolution was such a Case as ought
 not to be excepted, and another thing not to make
 that Exception. Now, tho' they wou'd have it that
 the Supreme Power he affirm'd it unlawful to resist
 was, the Supreme Legislative Power, to which no
 Resistance was then made, yet 'twas evident from
 his mentioning the Revolution (which was a Case
 of Resistance against the King) as an Objection to
 his general Rule, of the utter Illegality of Re-
 sistance, that the Non-Resistance he preach'd up
 was Non-Resistance to the Supreme Executive Power;
 and this was still plainer, from the Fallacy which
 was offer'd to induce their Lordships to think other-
 wise; it being undeniable, that the Lords and Com-
 mons did not join in that Resistance, as part of the
 Legislative Power, but as part of the collective Body
 of the Nation.

This frivolous Subterfuge being soon given up,
 he said the Argument proceeded on the Supposition
 that the general Assertion was to be understood of
 the Supreme Executive Power, and the Belief of
 the utter Illegality of resisting this, the Dr. had af-
 firm'd to be the Security of our Government, and
 the very Pillar on which it stands: And he had
 gone beyond the Apostle he wou'd be thought to
 imitate, who only laid down the Doctrine in gene-
 ral Terms, without mentioning any Exception;
 whereas the Dr. had mention'd the Exception, only
 to give it up: He pronounces those who make the
 Exception, and contend for the Lawfulness of the
 Resistance us'd at the Revolution, to be Enemies to
 the Revolution: And that Resistance which the
 Commons asserted to be the necessary Means which
 brought it about, the Dr. describes to be odious Co-

939. lours cast upon the Revolution; so that he had plainly declar'd himself, that the Resistance us'd to bring about the Revolution, was odious and unjustifiable, and not to be excepted out of his general Rule, of the Illegality of Resistance, on any Pretence whatsoever; and this Interpretation was not *strain'd or unnatural*, or the Charge maintain'd by *conjoining distant and independent Passages*; it was the only Sense the Words cou'd properly bear, and if this Construction appear'd to be necessary and certain, it was the same Thing as if he had maintain'd it in so many Words.

And he observ'd, That a Learned Gentleman, who spoke third in the Doctor's Defence, had demanded, *When the Original Contract* (so much insisted upon by this Manager) *was made? whether before Magna Charta? and how then* (says he) *came it not to be mention'd then, that being the Great Charter of the Rights of the People? Or* (says he) *was it before the 25 of Edw. 3. and then it cou'd never discharge that Act that was made after it? I never knew it pleaded* (says he) *on an Indictment for High Treason on that Act. And till the Legislature shall determine what that Contract is, and what Breach of it shall discharge the Subjects of their Allegiance, I must take leave to say, Resistance stands still upon the Foot of the Statute of the 25 Edw. 3.*

To this Mr. Lechmere replied, That the Gentleman who thus endeavour'd to explode the *Original Contract*, cou'd not be ignorant that those very Words were part of the Vote of Both Houses of Parliament, on the Abdication, when they resolv'd, *That King James the Second having endeavour'd to subvert the Constitution, by breaking the Original Contract between King and People, &c. the Throne was thereby become vacant.* Which Words having been made use of by the Commons with the greatest Deliberation, and approv'd by
 940. their Lordships in that first fundamental Step towards re-establishing the Government, the Justice of the Revolution it self must be affected by a Condemnation of that Position, That the denying the
 Original

Original Contract was not only to disavow the whole Proceeding at the Revolution, but to renounce the Constitution it self, and disclaim those many undeniable Proofs, which almost every part of our History, our Records and Memorials of Antiquity, wou'd furnish: That it was to condemn the Tenor of all our Laws, and every Act of the Legislative Power, the Force and Efficacy of which existed upon the Consent of the Crown, Lords and Commons: That the denying the Original Contract must render all our Rights precarious, and terminate in that absurd, but dangerous Opinion, of the *Patriarchal Right*, which join'd with the Doctrine of *Unlimited Non-Resistance*, wou'd compleat that fatal System which had been of late so much contended for, towards the enslaving Mankind.

He observ'd further, That the Maintenance of this Article did not rest only on that general Assertion of the Doctor's, but on many other Passages, from whence they had shewn their Lordships, that the Dr. had applied that general Rule of Non-Resistance, to the particular Case of the Revolution, but little Notice had been taken of this, which indeed wou'd have been his proper Defence: And how innocent soever the Dr. might have been, in preaching the same general Doctrine in the same general Terms as the Apostles and Fathers of the Church had done, without taking notice of any Exception, that cou'd be no Excuse to him, who had expressly mention'd and disallow'd the Exception of the Resistance which brought about the Revolution; and whatever might be the Language of our Laws, wherein the same general Duty of Subjects is stated and laid down, to secure their Civil Obedience in ordinary Cases, (and which cou'd not be construed to extend to the Case of a People threatned by their Prince with total Destruction) yet no such Declarations cou'd justify the Dr. who had not only out-gone those Declarations, but applied them to the Condemnation of the Revolution.

And he observ'd, That altho' many warm and pathetick Expressions of Loyalty had been us'd, of

their tender and dutiful Regard to Her Majesty's Title; yet the great Effort made by the Doctor's Council, had been to establish the Doctrine of Non-Resistance, and inculcate it in the same universal Terms the Dr. deliver'd it; it was very observable, he said, with what different Zeal the Justice of the Resistance which brought about the Revolution, and the general Doctrine of Non-Resistance had been handled: The Gentleman who open'd the Defence, had indeed acquainted their Lordships, *That there was nothing farther from their Hearts, or any thing less necessary for their Defence, than for them to call in Question the Justice of the Revolution*; but in other parts of his Discourse, his Expressions, even concerning the Revolution, wou'd be found more reserv'd and wary, but as to the Doctrine of Non-Resistance, what Fervency and Copiousness of Expression had been us'd to establish that! The Doctor's general Rule, they wou'd have it, was alone proper to be inculcated and believ'd, but the exempted Case was never to be stated, but to be suppos'd or imply'd, and to be left to *justify it self*.

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And he said, the Case of Necessity, the Case of the Revolution, was so ambiguously spoke of, and so skilfully given up, by the Gentleman who open'd the Defence, that by the kind help of some happy Distinction, when the Season was proper, 'twould be easy to retrieve it. And the judicious Reserves he had us'd, as to the Point in Question, and the real Service he had done to that slavish Doctrine of *Unlimited Non-Resistance*, might hereafter possibly be look'd upon as meritorious.

And if their Lordships consider'd, that the necessary Tendency of the Doctrines which had been preach'd by the Prisoner, and had been again asserted, tho' not openly avow'd, in their full Extent, in Defence of this Article, they wou'd find them to be the same with those Principles taught and avow'd by Papists and Nonjurors, and whereon their Hopes were founded; nor were they less dangerous from the Mouth of the Prisoner or his Council, tho' gild-ed over with specious Pretences, and under the Um-
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brage of a true Son of the Church, but it must be concluded, that the same Opinions embrac'd by the Dr. did inevitably engage him in the same Interest.

Sir Peter King, in his Reply to the Answer that Sir P. King's had been given to the Charge in the second Article, Reply, as to said, When he was entrusted by the Commons to the second manage this part of the Charge, he read those Pass. Art.

sages which made it good, for he did not desire any 943. thing should be receiv'd against him, but what appear'd from his express Words, or by clear, necessary, and unavoidable Consequence; and he agreed, that in Criminal Cases the Charge must be maintain'd by express Words, or such necessary Inferences as no reasonable Man cou'd withstand the Light of, and therefore they had shewn by plain Passages in his Sermon, he was guilty of the Charge in the second Article, viz. Of maintaining, *That the Toleration was unreasonable, &c.* And whereas the Doctor's Council had insinuated, that there were two Tolerations mention'd in his Sermon, one granted by Law, which he approv'd, and another unlimited Toleration, which he condemn'd; and that all the Passages condemning Toleration, were to be apply'd to the general Toleration, and not to the legal one. He observ'd, there were several Passages that wou'd be apply'd only to those who were entitled to the legal Toleration, as where he says, 'Whoever innovates, alters, or misrepresents any Point in the Articles of the Faith of our Church, (which the Dissenters in several Instances did) ought to be arraign'd as a Traytor to the State, &c. And tho' the learned Civilian observ'd, that this must be intended for those in Holy Orders, and not for the Dissenters, he admitted that to be true, as it stands at Page 8. but at Page the 10th, the Assertion was general, *Whoever innovates, &c.*

And as to the other Answer that had been given to this, viz. That it cou'd not respect the Dissenters, or their Toleration, because they agreed with us in Matters of Faith, and differ'd only in Matters of Discipline; this wou'd alter the Doctor's Meaning entirely, for he was not there speaking of Matters

of Faith, as distinguish'd from Matters of Discipline, but in general, of the Articles of the Faith of our Church; by which were meant the Thirty-nine Articles, and of them the Dissenters did not believe the Thirty-sixth, and consequently were to be arraign'd as Traitors to the State; and what then wou'd become of the Toleration, which exempted them from the Penalties, and from subscribing the said Thirty-sixth Article: And when that Act had granted them several Exemptions, that it shou'd be affirm'd, that this Heterodoxy allow'd by that Act was High Treason and Rebellion, and that they ought to be arraign'd as Traytors, he submitted it, whether any thing could be more plain against the Act of Toleration.

That the next Passage cited to prove this Charge was at the 16th Page; viz. *What cou'd not be gain'd by Comprehension and Toleration, must be brought about by Moderation and Occasional Conformity, &c.* And the Answer given to this was, That this Passage only shew'd, that Toleration cou'd not hurt the Church, and therefore they had found out the Method of Occasional Conformity; but all he cou'd collect from hence was, that Toleration was a less successful Evil than Moderation; one was the using *open Violence* to pull it down, the other a *secret Treachery* to blow it up; and to represent the Toleration as an *open Violence* to the Church, was an undue Reflection on the Fathers of the Church, and the Parliament who granted it, as if they concurr'd in Endeavours of pulling down the Church.

Another Passage cited to maintain this Article, was at the 8th Page, viz. *If upon all Occasions to comply with the Dissenters, &c.* Here he observ'd, the Dr. made it one of the Characters of a False Brother, to defend Toleration and Liberty of Conscience; and as to the Answer that had been given to this, That he did not blame those who only defended Toleration, unless they also laid the Fault on the Sons of the Church for carrying Matters too high, he appeal'd to their Lordships, whether any two of the Characters there enumerated were

to be united in one Person to make him a False Brother, and whether the several Characters were not so many different Criterions of False Brotherhood. And as to the other Answer, That this must be understood of a Toleration of such as were not qualified by this Act to receive it; he reply'd, That in this Passage he had condemn'd Toleration generally, and consequently that allow'd by Law; and if he had not intended to condemn it, he wou'd have excepted it.

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That the next Passage cited was that in Relation to the Perfidiousness of Archbishop *Grindal*, in deluding Queen *Elizabeth*: He said, in making out this Charge, he had applied himself principally to shew, that this Fact, as stated by the Dr. whether true or false, was a Censure of the Toleration, which the Dr. in his Answer conceiv'd it was not; but his Council, instead of shewing this was no Reflection on the Toleration, he observ'd had rather endeavour'd to shew, that the Fact was true, and had urg'd further, that it wou'd be an invidious Reflection on Queen *Elizabeth*, that she shou'd cause an Archbishop to be suspended for prosecuting *Julio* for having two Wives, or for not giving up his Palace to the Earl of *Leicester*.

Now he said he never imagin'd these to be the *Visible* Causes of the Archbishop's Disgrace; he admitted that to be the encouraging the Exercises call'd *Prophefying*: But it was by his prosecuting *Julio*, and his Refusal to Alien *Lambeth*, he had offended that Great Earl, and he knowing the Archbishop to be a Favourer of these Prophefying, misrepresented them to the Queen, and incensed her against the Archbishop. [And to make out this, he cited *Fuller's Ninth Book of Ecclesiastical History*, p. 30.]

But he observ'd, tho' Queen *Elizabeth* was displeas'd with those Exercises call'd Prophefying, which the Archbishop encourag'd, and which was the visible Cause of his Disgrace, yet it was a great Mistake, to think that those Prophefying were Conventicles or Assemblies of Puritans, they were really Meetings of the Parochial Clergy, to improve one another in the expounding of Scriptures, where

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wherein some grave Minister appointed by the Bishop did preside; and this cou'd not be call'd a holding Conventicles, or receding from the Discipline of the Church; he took this to be the way to make a Learned Clergy, and what, says he, was there in this to occasion the calling him a perfidious Prelate? He is perfidious, who violates his Conscience for temporal Ends: But the Archbishop chose rather to lose the Queen's Favour, than part with a good Conscience.

947. But the Question was, whether the Doctor's Representation of Archbishop Grindal, and his commending Queen Elizabeth, for the Resolution she took to suppress the Dissenters, was a Censure of the present Toleration: He said, he observ'd his Council apprehended that the Dissenters being then few, the exercising Severities at that time was wholesome, because it might have crush'd them in the beginning, tho' now they were grown numerous, it might be a Disturbance to the State; and from thence they infer, that what was spoken of the Toleration then, can't be applied to the Toleration now.

In Answer to this he observ'd, That the Preamble to the Bill to prevent Occasional Conformity, says, *That Persecution for Conscience only, is directly contrary to the Profession of the Christian Religion, and to the Doctrine of the Church of England*; and if so, the Dissenters, whether more or less, ought to be tolerated.

And whereas it had been urg'd, that in Queen Elizabeth's Time there was no Toleration granted by Law, and the Dr. only intended to excite the Magistrates to put the Laws in Execution, against such Offenders as were not exempted by the Toleration Act, he submitted to their Lordships, whether the Words were capable of such an Interpretation. The Dr. commended Queen Elizabeth's Zeal in resolving entirely to suppress the Dissenters, and her Prudence in putting those *Wholesome Severities* in Execution, such as hanging, burning, imprisoning them, &c. whereby, he says, the Crown sat easy on her Head; and this must be deem'd a Censure or

Con-

Condemnation of the present Toleration. He wou'd not reflect on Queen *Elizabeth*, but he thought these were Spots and Stains in her Reign, which were not to be found in the Reign of her present Majesty.

As to the last part of this Charge, That the Dr. asserts, *It is the Duty of Superior Pastors, to thunder out their Ecclesiastical Anathema's, &c.* He took notice, that one of his Council wou'd have it, that this was no more than declaring the Judgments of God denounc'd in Scripture; but he said it was plain he intended Ecclesiastical Censures and Excommunications; and whereas 'twas said the Expression related only to such as were ratified in Heaven, he observ'd there was a Power of loosing as well as binding, exercis'd by the Church on Earth, and if the Superior Pastor had, for just Cause, shut any Person out of the Church, that Sentence was ratified in Heaven; but yet if the Person reform'd, and the Church restor'd him again, the first Sentence, tho' ratified in Heaven, was vacated, by the Church's Power on Earth.

But the Question was, whether he excited the Superior Pastors to thunder out such Anathema's; and this he thought his Council had admitted; for they say that the Dissenters are Schismatics still, notwithstanding the Act of Toleration; and it was the Duty of Superior Pastors, the Dr. held, to thunder out their Anathema's against Schismatics, and dares any Power on Earth to reverse those Anathema's. This, he said, he look'd upon to be a clear Evidence of this part of the Charge.

Tenth Day. *Friday, the 10th of March.* 948.

Mr. *Comper*, in his Reply to the Doctor's Defence, as to the Charge in the second Article, said, When he spoke lately in Maintenance of this Article, he had mention'd what he apprehended wou'd be the Consequence of the Doctor's bitter Investives against the Toleration; and he was sorry he had so early an Occasion to say his Apprehensions were well grounded: Their Lordships had seen, even during the Continuance of the Trial, that this seditious

Mr. *Comper's* Reply as to the second Article. 1

ditionous Libel had produc'd an actual Rebellion, Meeting-houses had been pull'd down and burnt, in Defiance of the Supreme Power, and at the Instigation of one who wou'd be thought an Advocate for Passive-Obedience.

That notwithstanding what had been said in his Defence, the Commons still apprehended, that the Dr. had maintain'd, *the Toleration to be unreasonable*, &c. and that not in ambiguous Expressions, but in direct and positive Assertions.

His Council had admitted, that to speak against a known Law cou'd not be justified, and therefore had thought it expedient to deny this Charge, alledging, that the Dr. affirm'd nothing of the legal Toleration, but what he said respected only universal Toleration; but whether the Toleration mention'd in the Libel, cou'd be understood of universal Toleration, wou'd appear from these Words, *p. 34. Nay, now they have advanc'd themselves from the Religious Liberty our gracious Sovereign has indulg'd them, to claim a Civil Right, as they term it, and to juggle the Church out of her Establishment, by hoisting their Toleration into its place.* Here was no Colour to say the Dr. meant universal Toleration. And again, *p. 25. he says, They thrive upon Concessions, take Permission for Power, and advance Toleration into an Establishment.* And at *p. 14.* and several other Places, it plainly appear'd the Doctor's Spleen was levell'd at the legal Indulgence.

He observ'd further, That the Dr. and his Council all insisted, that the Dissenters remain'd Schismatics still, notwithstanding the Toleration; a bare Exemption from a Penalty had not alter'd the Case, which was agreeable to his Sermon, with this Addition only, That Schism is a damnable Sin: Without making any Allowance for Ignorance or Prejudice, as at *p. 8.* This Manager, therefore, cou'd not but think that Dr. Sacheverel wanted to be sweeten'd by that Spirit of Charity and Moderation, so much ridicul'd, especially since he had not only sentenced to Damnation, the Dissenters of eve-

ry Denomination, but at p. 24 all who defended Toleration.

He also cited that Passage at p. 16. viz. *What cou'd not be gain'd by Toleration, &c.* Here, he said, was a direct Assertion, That the Toleration was an open Violence; this Passage was most scandalously plain, and as plainly seditious; and the Dr. nor any of his Council, except one, had taken any Notice in their Answer of it, tho' twice mention'd by the Managers, which he look'd upon as a Confession of his Guilt.

Then he cited the Passage p. 10. viz. *Whoever pre-* 950
sumes to alter or innovate, &c. Here he said, if the Dissenters were Heterodox in Opinion, consequently they were Rebels and Traitors, according to Dr. Sacheverel, and ought to be punish'd as such by the Civil Magistrate, *they were to be hang'd as Rebels, and damn'd as Dissenters.*

He said he shou'd not lose Time, as to the second Head in this Article; for 'twas asserted, at p. 8. as plain as Words cou'd speak, *That to defend Toleration, was a Mark of a False Brother:* And p. 24. *He had assign'd him his Portion with Hypocrites, &c. in the Lake that burns with Fire.*

As to that part of the Charge, which related to Archbishop Grindal, he observ'd, the Dr. throughout his Sermon, was arguing with an intemperate Zeal against the Toleration, and representing that Law, as giving Encouragement and Protection to Schismatical Impostors, Rebels, Traitors, Jews, Quakers, Mahometans, &c. and then breaks out, p. 19. *These Charges are so flagrant, that a Man must be very weak, and something worse, who thinks or pretends the Dissenters are to be gain'd by any other Grants or Indulgence, than giving up our whole Constitution: Have they not, says he, ever since their unhappy Plantation in this Kingdom, by the Intercession of that False Son of the Church, Bishop Grindal, always improv'd, and rise upon their Demands in the Permission of the Government.*

Here, he observ'd, the Dr. cou'd mean no other than the present Dissenters, and that Indulgence which

which was at *present* granted them, and all the Answer the Dr. had given to this Passage, was, as if the Commons had impeach'd him for being too free with Archbishop *Grindal*, and using some undue Asperity of Expression towards him. He said they shou'd have been wanting to the Memory of that Great Prelate, if they had not taken Notice of those harsh Expressions; but they made use of this Passage to shew, that the Dr. had represented the Dissenters as headstrong and encroaching Monsters, dangerous to the Monarchy, as well as the Hierarchy, and had produc'd the Example of Queen *Elizabeth*, to shew how necessary it was, by *Wholesome Severities* to suppress them: Nor were there, he conceiv'd, any strain'd Constructions or Inuendo's necessary, to apply this Evidence to this part of their Charge.

951.

As to the last part, relating to the thundering out Ecclesiastical Anathema's, he observ'd, the Deience was, *That they were not intended against Dissenters*: But he said it appear'd from that Passage at p. 25. he was particularly speaking of them, for he lays, *And yet if our Dissenters had liv'd in those Times, &c.* Here was not a Word of those enormous Offences, to which he wou'd have these Anathema's relate; nothing was to be found here, but Dissenters, Schism and Toleration: And if these Anathema's were to be understood to extend to Persons entitled to the Toleration, then that Ayre of Insolence, with which he concluded this Period, viz. *Let our Superior Pastors do their Duty, &c.* was explain'd.

He concluded, That as the Commons were sensible, how necessary it was to support the Honour of the Revolution, to which he ow'd the Enjoyment of her present Majesty, the Protestant Succession, our Religion and Laws, so they were convinc'd, that the Welfare and Security of the Kingdom, in a great Measure, depended on inviolably preserving the Act of Toleration, which had been most maliciously and seditiously traduc'd and misrepresented by the Dr.

Mr.

Mr. Thompson, in his Reply to the Doctor's Defence, as to the third Article, viz. *That he suggests and maintains, That the Church of England is in a Condition of great Peril and Adversity, under Her Majesty's Administration*, said, He was concern'd, even for the Doctor's sake, to observe that the Charge in this Article remain'd entirely unanswered'd.

Mr. Thompson's Reply, as to the third Art. 952.

He said, If any favourable Construction cou'd have been made of some Passages in his Sermon, the Commons had not given their Lordships this Trouble, or the Dr. an Opportunity of reflecting on their Impeachment, as an uncharitable Prosecution.

And whatever Pity their Lordships might be inclin'd to in their private Capacities, for one who had brought himself into Affliction, he said he did not doubt they wou'd consider, that a Compassion, a Regard was due to the Welfare of their Country, preferable to any private Concern.

Then he proceeded to recapitulate what he had before insisted on, and shew'd, that the first Passage he had produc'd to prove this part of the Charge, was at Page the 5th, viz. *Tho' it were very obvious, &c.* To this, he observes it had been answer'd, That the Dangers the Dr. suggested to attend the Church, proceeded from blasphemous and heretical Books, from Infidels, and its profess'd Enemies: But he reply'd, who cou'd prostitute Altars and Sacraments, but some of his own Order? And who were they that did not discourage these Things, but suffer'd them with Impunity, but his Ecclesiastical Superiors, who were part of Her Majesty's Administration? And to this, he observ'd no Answer had been given.

He added, Tho' it might be the Duty of a Clergyman, at all Seasons to rebuke Vice and Immorality, it cou'd not be inferr'd from thence, he might revile his Superiors, and charge them in this Method, with their want of Duty ----- When it was his own Case, he thought the very Imputation of a Crime on any of his Function, must leave a Scar, and blemish his Character, then surely he ought to have consider'd the pernicious Consequences of reviling

viling those in Authority, before he had publish'd this Sermon: If the ill treating of him, who was an Ambassador of Christ, as he said, was a despising of Christ, Her Majesty might well be said to be revil'd, when those who acted by her Commission, and were part of her Administration, were reflected on.

The second Passage he produc'd in Maintenance of this Article, he said was at p. 16. *viz. Since this Model of Universal Liberty and Coalition fail'd, &c.* And as Men of Characters and Stations in the State, were construed to be Excise-men, Constables, &c. so he suppos'd those Persons who were to bring about the Comprehension, and were blowing up and undermining the Church, wou'd be interpreted Church-Wardens, Parish-Clerks, and Sextons: These sort of Constructions, he said, were so easy and natural, that he must agree with the Doctor's Observation, they had not much Argument, Learning, or Eloquence, to support them.

953. He observ'd further, That one of the Learned Council had answer'd this Passage and the next, by citing two other Passages, that were never mention'd, and concluded that the Dr. had nor, in these Passages, asserted the Church to be in Danger, under Her Majesty's Administration, but said not a Syllable of this Passage at p. 16.

The third Passage he said he produc'd, was at p. 18. *viz. Falshood always implies Treachery, and whether that is a Qualification for any one to be trusted, especially, with the Guardianship of our Church or Crown, let our Governors consider.* These Words, he observ'd, must relate to Persons, and cou'd have no Reference to Pamphlets, Blasphemies, or Heresies, by any Construction whatever, nor had they attempted to explain them otherwise.

The fourth Passage he had cited, was p. 20. *And now are we under no Danger, &c.* Here, he said, appear'd an Intention to reflect on the Members who Voted the Church to be out of Danger, by an Allusion to the Vote relating to King Charles: And tho' the Dr. wou'd have it, that they who Voted the King

King out of Danger, were not the same Persons who conspir'd against his Life; and that the Vote was a Year and half before the King's Death, and that there were not a tenth part of the Members then in the House, that Voted him safe. The Manager said, admitting all this, they were part of those who Voted him safe, and tho' the Parallel should not run so as to reflect on both Houses, and all the Members, yet if it was intended to glance at some of them, it was a Circumstance of Aggravation, which was the only Design in making it part of this Article.

The fifth Place cited to maintain this Charge, he said was in the last Page, viz. *She lies bleeding of the Wounds she has receiv'd in the House of her Friends*. He observ'd, the Dr. cited this Text to be in the 2d of *Lamentations*, v. 4. but he was sure there was no such Text in *Lamentations*; there was something like it, indeed, in the 13th of *Zach.* v. 6. but he thought the Dr. very unhappy in pitching on that Text, it having a Relation to False Prophets.

Having done with the Passages produc'd to maintain this Article, he observ'd, As to the scandalous Books and Pamphlets that had been given in Evidence by the Dr. he had drawn them from Obscurity, to republish to the World, tho' they were no way material to the Matter in issue: Most of these, he said, had stolen into the World, and the Authors were still conceal'd; some of them were printed in *Holland*, seventeen Years ago, and others since the Doctor's Sermon, and for the *Observer*, and *Rights of the Christian Church*, the Author of the one, and the Publisher of the other, had been prosecuted, so that he cou'd not say, these were *tolerated with Impunity*; or cou'd they be any Provocation for the Doctor's Censure. And he observ'd, there were other Books that as well deserv'd to be taken notice of, particularly *Dodwell's Tracts*, and *Mr. Lesly's Project of uniting ours and the Gallick Church*. These, he said, might have become an honest well-meaning Zeal, to have endeavour'd a Confutation of them, but to revile his Superiors,

for not punishing, what perhaps they never heard of, was not to be justified.

He said he cou'd not see how any thing cou'd be inferr'd in the Doctor's Favour, from the Proclamations against Profaneness, that had been produc'd; those cou'd give a private Divine no Authority to arraign his Superiors.

And he observ'd, Tho' the Dr. urg'd he had taken the Oaths to the Queen, and pray'd for the Queen, &c. yet he had not so much as complimented the Reverend Fathers of the Church, his Ecclesiastical Superiors, which was very strange, after a Charge of this Nature.

He observ'd also, that their Lordships had been told, that Inuendo's were dangerous Things, and that their Lordships had shewn their Dislike of them, and indeed, he said, to make an invidious Construction of a Man's Words, where they wou'd admit one more favourable, he cou'd not approve; but because an ill Use had been made of a Thing, it wou'd not follow, it must not be apply'd at all.

That in the Case of *Libellis Famosis*, cited by the Doctor's Council, it appear'd, that oblique Insinuations, as well as positive Assertions, were Libels, and if the Law had so guarded the Reputation of private Men, it wou'd be hard, if those in Authority might be reflected on, and revil'd, by sly Parallels and Allusions: But he said, Not only the Passages he had produc'd, were express, but the whole Tenor of the Sermon tended to shew the Peril the Church was in, from Persons in Church and State.

955. And had the Dr. only rebuk'd Immorality and Prophaneness, he might still have attended his Flock, they need not have attended him. [*His Parishioners part of the Mob.*] Nor wou'd he have been thought to have arraign'd the Resolution of Parliament; but for him to insinuate, That the Church was in Danger, from those Persons who had the Protection of it, was directly contrary to the Resolution of the Lords and Commons.

And as to that Demand of the Doctor's Council, What the Nature of this Offence was? He said he shou'd

shou'd answer in the Words of the Resolution of both Houses, *That whoever creates unreasonable Distrusts, &c. or goes about to insinuate that the Church is not in a safe and flourishing Condition, under Her Majesty's Administration, is an Enemy to the Queen, the Church, and the Kingdom; which in other Words was, Against the Law, against the Temple, and against Cæsar, he had offended.*

He observ'd further, That this bold Offender had told their Lordships at their own Bar, that by continuing the Indulgence to Dissenters, they countenanc'd Schism, and while Schism was continued in the Church, it must be in Danger; so that make what Laws they wou'd in the Dissenters Favour, he must still thunder out his Anathema's against them, as dangerous to the Church.

This, he said, was a Specimen of that Independency of the Church, so much contended for, and if not confuted by Authority, wou'd soon devour the Supremacy of the State: And he thought he might apply to the Dr. that Saying to the Goat, browsing on a Vine.

*Rode Caper vitem tamen hinc cum stabis ad Aras
In tua quod fundi Cornua possit erit.*

Mr. Serj. Parker being assign'd to reply to the Defence that had been made, to the Charge contain'd in the fourth Article, he said, He observ'd, that notwithstanding the Doctor's Council had declaim'd so earnestly, concerning the Hardship that had been done him, by joining distant Propositions, their Objection, rightly stated, was no more than this:

That he had in one place affirm'd, of all False Brethren in general, *That they do in themselves weaken, undermine and betray, and put it in the Power of others, who are profess'd Enemies, to overturn and destroy the Establishment.* And seven Pages off he had represented *Men of Characters and Stations, as False Brethren:* And therefore they had very unreasonably charg'd him with suggesting, *That there are Men of Characters and*

955.

Serj. Parker's
Reply, as to
the fourth
Article.

956.

Stations, in Church and State, who are False Brethren, and do in themselves weaken, undermine and betray, and do encourage, and put it in the Power of others; who are profess'd Enemies; to overturn and destroy the Constitution and Establishment.

To demonstrate the Justice of their Inference, he said, since he had a Man of Logick to deal with, he wou'd show, that according to the Rules of Logick, this Conclusion necessarily arose from the Premisses.

The Syllogism runs thus:

All False Brethren do in themselves weaken, undermine and betray, and do encourage, and put it in the Power of others, who are profess'd Enemies, to overturn and destroy the Constitution and Establishment.

Persons of Characters and Stations, are False Brethren.

Therefore Persons of Characters and Stations, do weaken, undermine and betray, &c.

The two first Propositions, he shew'd, the Dr. laid down, the other was the *necessary Consequence*.

And it cou'd not be suppos'd, but he laid down the Premisses, with a Design that his Hearers shou'd make the Conclusion; nor cou'd the People possibly avoid making the Application. He said, Shou'd any one insinuate to the Mob, *That the Church was to be supported by pulling down Meeting-houses, and rising the Houses of the Dissenters*, and afterwards only tell them, *This is a Meeting-house; Here lives a Dissenter*; they were not so dull, as not to make the Conclusion, *Therefore this House is to be pull'd down, or the other plunder'd*: Nor shou'd such a Man excuse himself, by saying, *that*
 957. *he bid them pull down this House, or rattle that, four Months before he told them, This was a Meeting-house, or that Man a Dissenter*; such an Excuse, he said, wou'd but add to the Indignation, against so impertinent a Trifler: And in this Case, Which was most to be regarded, the Distance of the Place, or the Connection of the Scheme, and the Nature of the Propositions? Shou'd the meanest of
 the

the People rightly collect this to be the Doctor's Doctrine, and shou'd not the Commons in Accusing, and their Lordships in Judging, be permitted to collect it.

As to the taking one part of one Sentence, and another part of another, whoever makes a Conclusion in Logick, ever does it, and only then does amiss, when the Consequence is not Just.

And as little to the Purpose was it, to say the Dr. had not restrain'd this Charge to Persons of the *Highest* Characters and Stations; for having spoken in reproachful Terms, of Magistrates in general, as well of those who have, as those who bestow Honours and Preferments, in Church and State, when he is shewing the Malignity of this Sin from Examples, he must be suppos'd to intend those of the *Highest Stations*, whose Examples were most contagious; nor cou'd the all-discerning People, especially when sufficiently enrag'd, restrain the Words to Constables, and such inferior Officers.

As to the Doctor's suggesting, *That Her Majesty's Administration tended to the Destruction of the Constitution, and charging those under her Authority, with Male-Administration*; this, he said, was so manifest, that after what had been said, 'twou'd be but losing Time, to attempt to make it plainer.

And did the shewing that a few paltry Scriblers, some of them dead, some mad, others unknown, show that there were Seminaries of Blasphemy or Impiety, or that the Government permitted them, and that they ought to be charg'd on Her Majesty, or her Administration, and call'd an open Violence upon the Church.

Had he complain'd of any scandalous Book to proper Magistrates, and they had neglected their Duty, he might have carry'd the Complaint against them and it to their Superiors.

But it was not to be born, that a Man should pass over all Magistrates, and make an Appeal to the People, not only against Offenders, but against the Magistrates themselves; this was, in the Doctor's own Words, *A Rebellious Appeal to the People,*

ple, as the *dernier* Resort of Justice and Dominion.

The Dr. indeed, pretended this Warmth of Speech was only to stir up the Magistrates to put the Laws in Execution, and had solemnly protested he meant no Reflection on the Queen, or her Ministry; and that by *Dangers of the Church*, he meant only such as God might justly inflict on so wicked a People.

958. He said he was amaz'd at the Doctor's solemn Protestations, so plainly against the Tenor of his Sermon, and desir'd Leave to read two or three Pages of it. [*Which he did; beginning with that Passage,] What a vast Scandal and Offence must it give to all Persons of Piety and Integrity, to see Men of Characters and Stations thus shift and prevaricate with their Principles, &c. And ending, And so we leave our False Brethren in the*
959. *Company they always keep Correspondence with.*

And after this, cou'd it be true (he demanded) that the Dr. only call'd upon the Magistrates to do Justice upon Offenders? He said he had search'd diligently, and cou'd find no such Exhortation in the Sermon: He did, indeed, condemn the Remissness of the Pastors that did not hear him: He advis'd the People to *mark and avoid* those that deserted them, and to put on their *bravest Resolutions*, as the *present* Case requir'd: He denounc'd Woe to the fearful Heart, and faint Hands, shew'd the Perils of the Church, That her Sons deserted her, That her Adversaries were *Chief*, and that her Enemies *at that Time prosper'd*; but this, he observ'd, was not the Language of one who was laying before Magistrates the Offences of their Inferiours: It was not calling upon the Magistrates, but the People, for Justice.

He added, that prophane Writers, Atheists, &c. might draw down God's Judgments upon us, but the Question was, What Hands were about to execute these Judgments upon us? They charg'd him with maintaining, That Her Majesty's Administration tended to the Destruction of the Constitution; and consequently, that those in the Administration, were

were about to execute those Judgments, and he solemnly protested, he apprehended no Danger, but from God.

This, the Serjeant said, was trifling, and evading, and serv'd but to direct their Lordships View, from the Persons he charg'd to be working the Ruin of the Church, to God, the Supreme Director, as if the Reflection on the Queen and her Ministry, were the less, for saying they were the Instruments, in the Hands of God, to scourge the Nation.

He next takes notice of the Doctor's Speech; He said it was extremely well compos'd, but fitted not so much to inform, as move, wherein his Hopes were justly plac'd, that it was fram'd to give the Passions a Mastery over Reason, and to persuade the World, that so excellent a Man as he had painted himself cou'd not be guilty of this Charge: That his Protestations were strong and hearty, and clear of those qualifying Clauses which, (tho' they might have suited better with the Truth of his Case,) might give the Readers a Suspicion of Guilt. 960.

He wish'd the Composer had given it a little more Resemblance of the Dr. and his Sermon, had there been fewer and less solemn Appeals to God, or more Truth in it, or he had known less of the matter, he shou'd have lik'd it better.

Great Regard, he said, was to be had to the Word of a Clergy-man, much more to his Oath, when he was free and unbiass'd, but when he was brought to Judgment, and had no way to escape, but by protesting his Innocence, neither his Word or Oath were to be regarded; at that rate, the *less Conscience* any such *Wretch* had, the surer and easier wou'd be his Escape; and therefore he hop'd their Lordships wou'd judge by what he taught, and not by what he pretended his Intentions were in doing it.

And tho' he complain'd of the Generality of his Charge, had they incerted the whole Sermon, as was the common Method, it wou'd have been much more uncertain, and they thought it much more to his Advantage, to specify the particular Points they wou'd insist on.

As to that Rule he urg'd, That *the higher the Charge is, the clearer the Proof should be*, the Sermons and Books, which were strictly the Evidence, were not denied to be his; and if he took Proof in a larger Sense, viz. The Reasoning upon the Evidence, the Proof was clear in this Sense too.

961. Indeed the Dr. seem'd to expect, that if he was guilty of the Things charg'd upon him, *the Passages might as easily be pointed to in his Sermon, as the Doctrine in those he produc'd; and that the bare reading them, without a Comment, would convict him.*

But even Dr. Sacheverel was not arriv'd to that Pitch, to arraign the Government directly and openly; nor cou'd it be thought, that one who was about to unhinge the Government, shou'd speak plainly: No:---- He was to cover his Design, even from those he wou'd draw in; he must not shock his Hearers at first, but pretend Zeal for Religion and Her Majesty, to preserve the People's good Opinion of himself, while he was doing that, which by Degrees wou'd alienate their Affections from her; this he must do, tho' he fear'd no Punishment, if he hop'd for Success; but when he knows he is liable to be call'd in Question, that was another Reason for Caution; therefore dark Phrases were to be studied, and Schemes of Speech to be contriv'd, that had two Meanings, the one more obvious and plain, to have its full Effect upon the People; and another that wou'd occur to no Body else, *A Reserve to be offer'd to a Court of Justice*: But if their Lordships shou'd pass by what he had spoken, infinitely more plain and audaciously than any other who had publickly dar'd Authority, they might expect to see a new Discourse from the Dr. where Sedition, that had a very *thin Disguise in this*, shou'd there have *none at all*. This, he said, might serve for an Answer to what was urg'd from his zealous Expressions for the Queen, they were only parts of the Blind and Disguise, his whole Discourse having quite another Tendency.

As to that Complaint, That he was accus'd for his Omissions, the Serjeant said, He had indeed shewn, that the Dr. had omitted the only true Notion of False Brotherhood, in the State which took in the Nonjurors and Disaffected, tho' his Text led him to it; That he had omitted to make the proper Use of Passive Obedience, in pressing Submission to Her Majesty, tho' the Day and the Doctrine requir'd it; and, on the contrary, he had us'd Arts to undermine and weaken Her Majesty's Title, disparage her Government, and render it odious to the People: And how was this consistent with his solemn Appeals to God, that his Intentions in that Sermon were to exert his *best Endeavour* for the Security of Her Majesty: Nor had the Dr. yet been able to shew where *he presses Obedience to the Queen*, tho' he had been expressly charg'd with not doing it.

He observ'd also, the Dr. complain'd of some Expressions of the Managers, not becoming *this Place*, 962. *or His Order*: He said he hop'd they shou'd always demean themselves with just Respect towards their Lordships; but as to the Dr. he was an accus'd Person, and was not to have any Respect paid him, that might prevent shewing the Enormity of his Crime, in its true Colours; and tho' his Orders might otherwise have secur'd him, his Crime depriv'd him at this Time, of that Protection: It was one Aggravation of it, that he had abus'd his Holy Function, which it was the Business of the Managers to *say and make out*.

And whereas he complains, That no Allowances were made to a Minister rebuking Vice and Irreligion, &c. The Serjeant observ'd, his Zeal was levell'd more at Persons than Crimes, that he magnify'd whatever was amiss, and charg'd it home upon the Government; and thus departing from the Office of an Ambassador of the Prince of Peace, and preaching up Sedition and Rebellion, his Orders were far from an Excuse.

As to that Head, of *wresting and perverting the Holy Scriptures*, his Council seem'd to promise that the Dr. shou'd give some Satisfaction therein, and

and he was in Expectation of it, but found himself miserably disappointed, and cou'd not but be in some Confusion for the Dr. tho' he seem'd to have an entire Satisfaction in himself. He observ'd, his Answer to this Point was a Master-piece of Equivocation and Malice, where he says, *Hard is the Lot, &c.* He did not, in those Words, either confess or deny the Charge; but they were an Appeal to the Passions of the People; it was so contriv'd, indeed, as might induce the unwary Reader to believe he deny'd the Charge, but now he was come upon his Trial, and charg'd home with it (and a heavier Charge cou'd not be laid on a Minister of the Gospel, or more affecting to any one who had not abandon'd all Pretence to common Honesty,) he only says, *If he was guilty, he was to answer it at another Tribunal, where he was to be judg'd by those Scriptures.*

But wou'd he thus give himself up for a Falsifier of the Word of God, and yet hope for any Reputation, or any *Capacity of doing Good*, in preaching it?

Was it thus the Dignity of the Sacred Order was to be supported? Was this the Cause of the Church, and of Christianity? And were they wound up in the Fate of an Impostor and False Prophet?

And if he was self-condemn'd, and dare not open his Mouth on this Head, how dare he declare his Hopes, that *those* of their Lordships, whose Studies led that way, wou'd acquit him?

He had, indeed, as in a most solemn Act of Devotion, appeal'd from this, the most august Judicature upon Earth, to a yet Greater in Heaven, but with what Sincerity, what Candour, or Sense of what he had done.

He stood amaz'd, to see a Person in Holy Orders, in his distinguishing Habit, before that awful Assembly, dare to take the tremendous Name of God into his Lips, and appeal to him for the Integrity of his Heart, when he stood charg'd with this black Crime, and cou'd neither repel it, nor had the Sincerity and Honesty to repent and take Shame to himself, and ask Pardon of God and the World for it.

While

While he cou'd thus face out such a Crime, and equivocate and play double with their Lordships, with God Almighty, and his own Conscience, what Regard was to be had to his most solemn Protestations?

Therefore the Honour of the Christian Religion, the Church and its Holy Orders, the Security of the Government, and the Protestant Succession, the undeceiving of the People, and the quieting the Minds of the Protestant Dissenters, the vindicating the Honour of the late Revolution, and the Glory of their Great Deliverer, and to banish Sedition from the Pulpit, which ought to be sacred to divine Purposes, these Things did REQUIRE the Commons to demand their Lordships Judgment on this Offender.

Nor was his Punishment, as the Dr. observ'd, all they aim'd at, but what they expected from their Lordships Justice was, the supporting the Establishment, and preventing all Attempts to sap its Foundations; and he hop'd the Clergy wou'd be instructed, not to preach the Doctrine of Submission in such manner as to prepare the Way for Rebellion: And he doubted not, but those to whom their Proceedings had been misrepresented, wou'd observe the Favour shewn to this Man in the Manner of their Charge, and their Care for the Honour of the Church and Clergy, in singling him out for an Example in these impious Attempts against his Country, who plainly appear'd the Shame of his own Order.

Here my Lord *Nottingham* desir'd to propose a Question to the Judges: Whereupon the Lords adjourn'd to their House above, and being return'd, my Lord *Nottingham* propos'd this Question in the Hall.

Whether, by the Law of *England*, and constant Practice in all Prosecutions by Indictment or Information, for Crimes and Misdemeanors by Writing or Speaking, the particular Words suppos'd to be criminal, must not be expressly specified in such Indictment or Information?

Then

The Words
suppos'd to
be criminal,
must be spe-
cified in an
Indictment or
Information.

964.

The Words
supposed to
be Criminal,
need not be
specified in
an Impeach-
ment.

Then the Lords adjourn'd to their House again, and being return'd, the Lord Chancellor propos'd the Question to the Judges, who all declar'd; that the particular Words suppos'd to be criminal, ought to be specified in such Indictment or Information.

Then the Lords adjourn'd to their House above, and did not come into *Westminster-Hall* again till *Monday, March* the 20th; but in the mean time they resolv'd, *That by the Law and Usage of Parliament, in Prosecutions by Impeachments for High Crimes and Misdemeanors, by Writing or Speaking, the particular Words suppos'd to be criminal, are not necessary to be expressly specified in such Impeachments.*

And the Question being put in the House, That the Commons had made good their first Article of Impeachment, as also the second, third, and fourth, it was severally resolv'd in the Affirmative.

Monday, March the 20th, the Lords came down into *Westminster-Hall*, and the Lord Chancellor put the Question, which had been before resolv'd on above, viz.

That Dr. Henry Sacheverel is guilty of the High Crimes and Misdemeanors charg'd on him by the Impeachment of the House of Commons.

964.

The Dr. Con-
victed.

This Question having been put to every Peer severally, beginning with my Lord *Pelham* the youngest, and having deliver'd their respective Opinions, the Lord Chancellor numbred them, and said there were One hundred and twenty one of their Lordships present, and of these sixty-nine had found *Dr. Henry Sacheverel* guilty of the High Crimes and Misdemeanors Charg'd on him by the Impeachment of the House of Commons, and fifty-two had found him Not Guilty.

Then *Dr. Sacheverel* was brought to the Bar, and kneeled till the Lord Chancellor bid him rise: After which the Dr. said, that being commanded to withdraw while their Lordships deliver'd their Opinions, he was prevented offering several Things to their Lordships in Arrest of Judgment, and desir'd he might offer them now, and that his Council might be heard to them.

Moves in Ar-
rest of Judg-
ment.

The

1. The first was, That no entire Clause, Sentence or Expression, contain'd in his Sermons, was particularly set forth in the Impeachment.

2. That the Articles were said to be only by the Knights, Citizens and Burgeses, leaving out Commissioners of Shires, and Boroughs, which was neither agreeable to the Impeachment, nor the Title of the House of Commons since the Union.

Then the Lords adjourn'd to their House.

Wednesday, March 22. (in the House of Lords) a Message was sent to the Commons, to acquaint them their Lordships were ready to give Judgment, if they came with their Speaker to demand the same.

Thursday, March 23. The Commons came up with their Speaker, to the House of Lords, to demand Judgment, and the Prisoner being brought to the Bar, kneeled, till the Lord Chancellor bid him stand up: And Mr. Speaker having demanded Judgment,

The Lord Chancellor acquainted the Dr. That as His Exception to what he had mov'd in Arrest of Judgment, their Lordships had resolv'd, That by the Law and U. rul'd. of Parliament, the particular Words suppos'd to be Criminal, were not necessary to be expressly specified, in Impeachments for High Crimes.

As to the 2d, their Lordships found, that in the Act for rendring the Union of the Kingdoms more compleat, that the Terms, *Commissioners of Shires, and Knights of Shires, Commissioners of Boroughs, and Burgeses*, were us'd as synonymous Terms, and therefore had over-rul'd that Exception.

Then he proceeded to pronounce Judgment, as followeth, viz.

That you, Henry Sacheverel, Doctor in Divinity, shall be, and you are hereby enjoined, not to preach, during the Term of three Years next ensuing: That your two printed Sermons, referr'd to by the Impeachment of the House of Commons, shall be burnt, before the Royal-Exchange in London, between the Hours of One and Two of the Clock, on the 27th of this Instant March, by the Hands

Hands of the Common Hangman, in the Presence of the Lord Mayor of London, and the Sheriffs of London and Middlesex.

The Oxford
Decrees burnt
with his Ser-
mons.

After which, the Dr. being withdrawn, an Order was made, directed to the Lord Mayor and Sheriffs, to see the Sentence executed: It was also order'd, That the Oxford Decrees, lately publish'd, in a Pamphlet call'd, *An entire Confutation of Mr. Hoadly's Book, of the Original of Government*, should be burnt at the same Time and Place with the Doctor's Sermons.

*The Trial of FRANCIS FRANCIA,
for High Treason, at the Old
Baily, the 22d of January,
2 Georgii, 1716.*

The Trial put
off, for a Mi-
stake of a Let-
ter in the Co-
py of the In-
dictment de-
liver'd the
Prisoner.

The Trial put
off again, for
want of Ju-
rors.

THE Prisoner had been formerly arraign'd, and brought upon his Trial, but it appearing he had not had a true Copy of his Indictment, (there being a Mistake of an *I* for an *A*) the Trial was put off for that Time.

He was afterwards brought upon his Trial, but challenging so many of the Pannel that there were not Jurors enough left to try him, the Trial was again put off: And the Trial was twice put off by the King's Council, some of their Witnesses being Abroad.

The 22d of January, 1716, the Trial proceeded, and the Pannel was call'd over; and first Sir *Dennis Dutry*, Baronet, was call'd.

Agreed, that
a Juror ought
to have 10*l.*
per Ann. Free-
hold, or Co-
py hold, in
the City.

Prisoner. Are you a Free-holder in this City?

Sir D. Dutry. Yes.

Sir Jo. Jekyl. My Lord, we that are of Council for the King agree, that every one of the Jurors, before they are sworn in Chief, be ask'd that Que-
stion,

stion, Whether he have Free-hold, or Copy-hold, to the Value of 10*l.* per Annum?

Then Sir Dennis Dutry was sworn, upon a Voire Dire, with Respect to his Free-hold, and depos'd, that he had about Ten Pounds per Annum.

Prisoner. My Lord, there has been a Suit depending between us.

Mr. Att. If he talks of a Suit, he must prove it Sir Ed. Northy, by Record.

Prisoner. His Name is Dennis, and in the Pannel they have given me, he is return'd by the Name of Dionysius. Objct. That a Juror's Christian Name was not right;

Sir Jo. Fekyl. The Pannel is not to be put into English for him.

Mr. Ward. But we say Dionysius is not Latin for Dennis.

Prisoner. Dennis is a Saint in France, and Dionysius a Saint in Italy; they are two different Names: And in my former Pannel he was put down Knight, and in this, Baronet. You allow'd this Challenge the last Time.

Mr. Att. You challeng'd him peremptorily.

Mr. Ward. He was stil'd, Knight, in the last Pannel.

Lord Chief Baron. That don't appear to us; Sir — ~~Dude~~. If you don't challenge him peremptorily, he must be sworn.

Prisoner. Then I challenge him: But I think 'tis hard.

Cl. of Arr. John Casebert.

Prisoner. He was upon the Grand Jury that found the Bill against me, and I challenge him for that Cause.

Cl. of Arr. Isaac Cailouell.

Prisoner. His Name is wrote in the Pannel, v Consonant, and he spells his Name with a w, and it is a single l in the Pannel, and he writes it with a double l.

Mr. Cailouell said he wrote his Name with a v Consonant, but with a double ll.

L. C. Bar. That don't alter the Pronunciation: It is the same Name.

Prisoner.

The TRIAL of

Prisoner. I challenge him.

Cl. of Arr. Henry Greenway.

Prisoner. I challenge him, for Cause, in the Pannel it is Greenway, and his true Name is Greenaway.

Sir Jo. Jekyl. How are you commonly call'd?

Greenaway. I am usually call'd Greenaway.

A Juror set aside for a Mistake of a Letter in his Sir-name.

He was set aside.

Several others having been challeng'd, as well on the part of the King, as of the Prisoner, peremptorily, at length the following Jurors were sworn.

Sir Daniel Wray, Kt.

Joseph Chamberlain.

Thomas Davis.

John Davis.

Joseph Emmes.

John Farr.

John Glasbrook.

William Kent.

Thomas Lingard.

Stephen Lee.

John Mahew.

Henry Mallet.

Geo. Flint allow'd to assist the Prisoner, as an Interpreter, at his Trial.

Prisoner. I desire *George Flint*, a Prisoner in *Newgate*, may be sent for, and may be near me at my Trial: He is in *Newgate* for a Fine.

L. C. Bar. Then he may be sent for. *And he was sent for accordingly.*

The Indictment, for High Treason, in conspiring the Death of the King.

The Indictment sets forth, That the said *Francis Francia*, late of *London*, Merchant, not weighing the Duty of his Allegiance, &c. but traiterously intending to alter and subvert the Government, and to depose His Majesty King *George*, and bring him to Death, and to place the Pretender on the Throne, on the first Day of *September*, in the second Year of the King, and at several other Days and Times, as well before as after, did maliciously, devilishly and traiterously compass and imagine the Death of the said King; and that to accomplish and bring about his said traiterous Intention, he

Overt Acts: Consulting and agreeing to levy War.

did meet, consult and agree with divers other Traitors, to the Jurors unknown, to raise a War and Rebellion in this Kingdom, against the said King, in Favour of the Pretender; and the more effectually to compleat his said traiterous Intentions, he did propose, consult and agree with divers other Traitors, to the Jurors unknown, to solicit and procure

procure Arms, Ammunition, and Money, of divers Foreigners, and others, in the Kingdom of France, to aid and assist in the said War; and that the said Francis Franckia did traiterously compose and write, and caused to be composed and written, several traiterous Letters, signifying the Intentions and Resolutions of him the said Francis, and the said other Traitors, and requiring Aid in the said War of the said Foreigners, and other Persons in France, and did traiterously send the said Letters to Parts beyond the Seas, and caused them to be delivered to the said Persons in France accordingly, against the Duty of his Allegiance, the King's Peace, &c.

The Jury being sworn, and charg'd with the Prisoner, Mr. Comper the Younger open'd the Indictment, and Sir Jo. Fekyl, and Mr. Attorney General, (Sir Edward Northey) open'd the Evidence; wherein is offer'd nothing material, but what is to be found more at large in the Evidence itself, save that Mr. Attorney acquaints the Court, that Preparations were making many Months before the Rebellion broke out in Scotland, under the Earl of Marr, in September, 1715, and under Mr. Foster, in Northumberland, the October following, and that the like Insurrection was design'd at Oxford, Bath, &c. as well as appear'd on the Trials of the Persons who had suffer'd for those Treasons.

That the Correspondencies between the Prisoner and Mr. Harvey of Combe, with the Duke D'Almont, and Abbot Butler, began in the Queen's Time, and appear'd to be carried on with great Secrecy and Caution, which induc'd a Belief that they were then Criminal; but that did not directly affect the Prisoner upon this Indictment, it being laid only for Treason committed against his present Majesty; and they should read those Letters in the Queen's Time only to show how the Correspondence began.

He said, that a Conspiracy to levy War, to dethrone or to deprive the King of his Liberty, was an Evidence of imagining his Death; for War necessarily tends to those Ends.

674 *THE TRIAL of*

That it cou'd not be expected they should produce the Letters the Prisoner had sent into *France*, from Mr. *Harvey*; but he observ'd, that the Answers to them, which were found in the Prisoner's Custody (and which they shou'd give in Evidence) took notice of the Contents of them, and shew'd that he knew the Design of those Letters to be, to further the Pretender's Invasion; which he insisted was a full and sufficient Evidence to prove the treasonable Correspondence charg'd in the Indictment: As

Letters sent to those Letters directed to the Prisoner, and stopp'd the Prisoner, at the Post-house, they having never been in the which never Prisoner's Custody, he said they shou'd not offer came to his them in Evidence, but he took notice, that in one Hands, not to of them, *D' Aubray* complains that the Correspondence was interrupted; and in another to *Francis's* Son, he bewails his Father's Misfortunes.

He said, it cou'd not be pretended, that *Francis* only convey'd Mr. *Harvey's* Letters to his Correspondent, and so was only guilty of Misprision of Treason, in concealing the other's Treason, for when he cover'd Mr. *Harvey's* Letters, he also wrote such Things in the Cover, as demonstrated he was acquainted with the Subject of the Correspondence, and assisted to, and assisted in the Treason; and the Law is so, That he who knows of the Treason before it is done, and assents to it, is *Particeps Criminis*, and guilty of Treason.

Mr. Attorney having open'd the Evidence, the Witnesses were called; and first,

Joseph Smith was sworn.

He depos'd, That he was one of His Majesty's Messenger's. Messengers, and being in waiting at the Secretary's Office, the 19th of September, 1715, he had a seizing the Warrant deliver'd him against the Prisoner, but he Prisoner and did not execute it that Night, it being late, but the his Papers.

Next Day he went to the Prisoner's House in *Plot-Tard* in *Fetter-Lane*, with Mr. *Wilcox*, another Messenger, and they found the Prisoner in Bed with a Woman he call'd his Wife: They told him they had a Warrant against him for High Treason, and bid him get up: That afterwards the Depoent discover'd a Closet in the Room, where he found a Parcel

Parcel of *French Letters*, lying open, in Folio, and directed to the Prisoner; and he also found a Paper Book, lying upon the Desk, which the Prisoner said was his Son's Writing, and that it was his Copy-book of his Correspondence Abroad, and signified nothing; but the Deponent observ'd him to be under a more than ordinary Concern: That having search'd the Closet, and other Parts of the House, and put up all the Papers they could find, they stay'd a little, at the Prisoner's Request, and drank a Dish of Coffee with him, and then brought him to a House in *Westminster*, where they left him, and carry'd the Papers to the Secretary's-Office, and deliver'd them to Mr. *Horatio Walpole*.

Mr. Att. What is become of Mr. *Wilcox*?

Smith. He is dead.

Mr. Hungerford. How can you be sure this is the Book you seiz'd? [*The Copy Book being shewn him.*]

Smith. I never parted with it, till I deliver'd it into the Office: and I took notice of this Writing, as the Prisoner sat dressing himself. [*George Francia's Name in large Text, at the End of the Book.*]

Prisoner. Did you, or *Wilcox*, carry the Book and Papers to the Office?

Smith. I did.

Prisoner. I know that's false: How soon did you go out of Town, after you had lodg'd me?

Smith. In a Day or two, I did, but not that Day.

Prisoner. Did you take no more Books?

Smith. There were several other Books in your House, but I don't remember I carried any of them away but this.

Mr. Horatio Walpole sworn.

He depos'd, That the Warrant for seizing the Mr. *Walpole's* Prisoner was dated the 19th of *September*, and that Evidence of the Day after Mr. *Smith* and Mr. *Wilcox* deliver'd the Prisoner's him a Copy-Book, and a Parcel of Letters, which Examination. they said they took at *Francia's* House: That the same Night Mr. *Buckly* came into the Deponent's Room, and they sat down and look'd them over together, and the next Day my Lord *Townsend* sent

The Prisoner for the Prisoner, and the Deponent carried the Book
 was the Re- and Letters, and laid them upon the Table, and my
 ceipt of the Lord examin'd the Prisoner about them: That the
 Letters.

And that those enter'd in the Copy-book were enter'd by himself, or his Son. Letters were wrote in *French*, and directed to the Prisoner; and my Lord turn'd over all the Letters, and ask'd the Prisoner if he knew the Hand, and if they were directed to him? And the Prisoner own'd he receiv'd them: And that my Lord ask'd if that were his Book, and the Prisoner answer'd, it was; and some of the Letters were enter'd by himself, and some by his Son.

Sir *Jo. Jekyl*. Were they the same Lettets, and is this the same Book, that *Smith* brought you?

Walpole. Yes, I am sure they were the same that *Smith* deliver'd me, and said he took at *Francis's* House.

Then several Letters were shewn Mr. *Walpole*, which he depos'd were the same he receiv'd.

Mr. *Att*. What became of the Letters after the Prisoner was examin'd?

Walpole. I took them back, and kept them constantly, till I went to *Holland* for the Dutch Troops, and then I deliver'd them to Mr. *Buckley*.

Prisoner. You swear very home; what Mark did you put upon those Letters, that you can swear to them?

Mr. *Ward*. Are you sure they were not deliver'd out to any one?

Walpole. I am sure.

Mr. *Ward*. Are you sure they were not deliver'd out to *Jones* the Gun-maker, when he was under Examination.

Mr. *Walpole*. I don't know that they were.

Mr. *Hungerford*. How do you know these were the same Letters, if you put no Mark on them?

Mr. *Walpole*. I perus'd them several Times, and remember the Hand, the Dates, and Directions.

Mr. *Hungerford*. Then possibly you remember the Number of them too.

Mr. *Walpole*. No, I don't remember the Number of them.

Mr.

Mr. *Ward*. Are these all the Letters that were brought you?

Mr. *Walpole*. No, these are not all.

Mr. *Buckley* was sworn.

Being shewn the Book and Letters, he depos'd, That the Day the Prisoner was seiz'd, he read them over, with Mr. *Walpole*, and when Mr. *Walpole* went to fetch the *Dutch* Troops, he left them with the Deponent, and that by my Lord *Townsend's* Direction he extracted the most Criminal Passages out of them. [Then he look'd over the Letters, one by one.] After which he depos'd, That he was sure he had every one of these Letters from Mr. *Walpole*, for he had extracted some Passages out of all of them.

Mr. *Buckley* deposes, that the Letters were left with him, when Mr. *Walpole* went over for the *Dutch* Troops.

Mr. *Cowper*. Were the Book and Letters produc'd at his Examination?

Mr. *Buckley*. I can't say that; he was examin'd by my Lord *Townsend*, and Mr. Secretary *Stanhope* and I was call'd in to take the Examination in Writing, and was intent upon hearing what the Prisoner said: When I had written down what is in my Hand, [shewing the Original Examination] I read it to him distinctly, and being ask'd if he was willing to Sign it, he answer'd, Yes; and I offer'd him the *New Testament* to swear on; he said he could not swear on that Book, but pull'd a Book out of his Pocket, and I swore him on that; I ask'd him if it was true, he said it was, and sign'd it; and then my Lord *Townsend* sign'd it.

That the Prisoner sign'd his Examination.

Prisoner. On what Book did I take my Oath?

Mr. *Buckley*. I can't tell; Mr. Secretary *Stanhope* look'd upon it; I believe 'twas *Hebrew*.

Mr. *Ward*. How long were the Papers in your Custody?

Mr. *Buckley*. 'Till Mr. *Walpole* came back, and then I return'd them to him again.

Mr. *Ward*. Were they not deliver'd out to *Jones*?

Mr. *Buckley*. They were not deliver'd out by me,

Mr. *Ward*. Did not he desire to read the Examination himself?

Mr. *Buckley*. I don't remember it.

Mr. *Ward*. Was not he refus'd to read it?

Mr. *Buckley*. No, upon my Soul.

Mr. *Ward*. Was you with the Prisoner in *Newgate*?

Mr. *Buckley*. I was with him twice, at his *De-fire*.

Mr. *Hungerford*. Did you make him any *Of-fers*?

Mr. *Buckley*. Pray explain your self.

Mr. *Hunger*. Did you promise him his *Liberty*, upon signing any *Paper*, or mention his giving *Evidence* against any *Person*?

Mr. *Buckley*. No, upon my Soul.

A Witness
ought not to
be ask'd if he
tamper'd with
the Prisoner.

Mr. *Att*. Such Questions ought not to be put, for it is criminal to tamper with any Man.

Prisoner. Is that the Book I swore upon?

[*Shewing a Book.*]

Mr. *Buckley*. I can't tell; it was such a kind of a Book.

Mr. *Att*. It is not material, if it was the *Al-choran*; it is not his Oath, but his Confession, that is material.

Mr. *Hungerford*, (*taking the Book in his Hand*) I understand a little *Hebrew*; it is a Book to pray by, not to swear by; a Collection of some Jewish Prayers, you had best send it to the Learned *Mon-falcon* at *Paris*, he is composing some Critical Observations on the *Eastern Languages*.

Mr. *Hunger*. Where are the Extracts you made out of the Letters?

Mr. *Buckley*. Here are some of them, (*shewing some Papers,*) and here is the two Initial Letters of my Name, upon some of the Letters.

Prisoner. When was that Mark made upon them?

Mr. *Buckley*. When they were in my Possession, before I return'd them to Mr. *Walpole*.

The Lord *Townsbend* sworn.

L. *Townshend's*
Account of
his ordering
the Prisoner
to be taken
up, and of his
Examination.

He depos'd, That being inform'd there was a Treasonable Correspondence carried on, between the late Duke of *Ormond*, Duke *D'Aumont*, *Conlange*, (*alias D'Aulmay*, *alias Payen*) and Mr. *Harvey*, and

and that the Prisoner was the Chancel in which the Correspondence was convey'd; and that it was manag'd under Pretence of a Law-Suit, and that the Pretender was soon expected here, he made a Warrant to seize the Prisoner, and his Papers, and he was seiz'd accordingly, and his Letters brought to Mr. *Walpole*.

That the next Day he sent for the Prisoner, to examine him, and Mr. *Walpole* brought the Letters and the Copy-Book, and laid them upon the Table, and the Prisoner own'd the Letters, but said, he cou'd not help what was in them; what others wrote cou'd not make him guilty; And for what he had wrote, he appeal'd to the Book (which he said was his) for his Innocence: That he did not appear obstinate. And at Night he sent for him again, and Mr. Secretary *Stanhope* was with him: That in the mean time he had perus'd more of the Letters, and observ'd several Initial Letters of Peoples Names, and the Prisoner explain'd them to him, as they are in his Examination. That he seem'd in a Disposition to tell all he knew, and gave an Account how the Correspondence was begun and carried on, and he remanded him that Night, having taken the Examination in his Hand. (*Here a second Examination taken on Mr. Harvey's Letter, with that Letter annex'd, were shewn His Lordship,*) and His Lordship depos'd, That was the very Letter, and the Prisoner explain'd the Figures in it to him, and solemnly protested, 'twas all he knew, which His Lordship was then inclin'd to believe, but some further Discoveries made him think otherwise afterwards: That one of the Examinations was sign'd by His Lordship alone, but the other by Mr. Secretary *Stanhope* also; the first he thought Mr. Secretary *Stanhope* was gone out of the Room before it was sign'd.

Sir *Jo. Fekyl*. Were all the Letters that Mr. *Walpole* brought laid upon the Table at the Examination?

L. Towns. They were all laid there, and I saw him take them back again.

Mr. Ward. Did Your Lordship hear the Examination read over to him?

L. Townsh. I dare say I did.

Mr. Ward. Wou'd not he have excus'd himself from signing it, till he had read it?

L. Townsh. I don't know he made any Difficulty in signing it; I'm sure he cou'd not because he was refus'd to read it.

The Prisoner suggests my it? *Prisoner.* Was there no Reluctance in me to sign

Lord Townshend. *L. Townsh.* What do you mean? Have I not answered that already?

Prisoner. Did not you offer me Money to sign it?

L. Townsh. Can you say a Thing of so much Infamy? When he had been Examined, he shew'd me the Misery he was reduc'd to; he said his Wife and Family must starve, and he was at a Loss for a Supper. I told him he cou'd expect no Favour, but on a free Confession. Still he begg'd on; and in pure Alms, I put my Hand in my Pocket, and gave him three, or four, or five Guineas: It was what I could never refuse to a Man who apply'd to me in that manner, and begg'd so hard: He said his Brother wou'd not look upon him, because he was taken up for High Treason: And desir'd I wou'd give him something in Charity; which I did.

Prisoner. Did you ever bestow the like Charity? Pray, my Lord, name the Man you ever gave five Guineas to before. *(At which there was a great Laugh.)*

Prisoner. I must not be laugh'd out of my Life: I wou'd know who he ever gave five Guineas to besides.

L. C. Bar. My Lord says it was out of Charity.

Prisoner. And that he never refus'd five Guineas to any Man under his Examination?

L. C. Bar. No; he says he cou'd never refuse his Charity to one that begg'd as you did.

Prisoner. I had as little Occasion to beg as some others.

Mr. Ward. I wou'd ask Your Lordship, whether the Prisoner was not told, when he sign'd his Examination,

mination, it was for some particular Purpose, and Suggests he that it shou'd not be binding to him? was promis'd

L. Towns. He desir'd it might not be made use of his Examination against him; which I told him depended on his shou'd making a full Confession, and then I shou'd use my not be us'd against him. Interest, that he might find Mercy: But on Perusal of the Letters, I found he did not only barely convey them, but was wrote to as a Manager: My Lord answers, That Whereupon I told him he must know more; and he was on Condition he standing out that he did not, I sent him to Newgate. made a full Confession. Afterwards his Wife acquainted Mr. Buckley,

if she cou'd see her Husband, she cou'd persuade him to discover all; and I gave Directions he shou'd be put in a Messenger's Hands: While he was there, one Curtis brought a Letter to me, which he found by Francia's Bed-side, and was directed to his Wife, wherein he tells her, He found better Company in Newgate than he expected, and that there was nothing against Mr. Harvey that cou'd hurt him, and that he laugh'd at any thing the Government cou'd do to himself, &c. (See the Letter hereafter.) Which convinc'd me he had not dealt ingenuously with me.

Mr. Hunger. Is it proper to give Evidence of the Substance of a Letter, without producing it?

Mr. Just. Pratt. My Lord mentions this in Answer to Mr. Ward's Question, Whether the Prisoner was not promis'd, his Confession shou'd not be made use of against him; and gives this as a Reason to justify his using it.

Mr. Att. Do you insist upon the reading it?

Mr. Hungerf. I don't press it.

Mr. Walpole was call'd again, and the Letter shewn him.

Mr. Att. Pray, Sir, how came this Letter to your Hands?

Mr. Walpole. Curtis brought it me, and said he found it by Francia's Bed-side, at the Messenger's House; and I made this Mark on it, whereby I know it again. [Shewing a Mark.]

Mr. Ward. It being found by the Prisoner's Bed-side don't prove it to be his Hand.

Mr.

Mr. Buckley was call'd again, and the Letter shewn him.

Mr. Soll. Pray whose Hand-writing do you take that to be?

Mr. Buckley. I never saw the Prisoner write, but once, and that was when I went to take his Confession, and then I sat by him an Hour, and saw him write, and read it over afterwards.

Mr. Sol. Do you believe it to be his Hand-writing?

Mr. Buckley. From the Writing in the Book that was found in his House, and from what I saw him write then, I believe it to be his Hand.

Mr. Denton. Did you mark this Letter?

Mr. Buckley. Yes.

Mr. Hungersf. He wou'd prove his Hand by two Inducements; one that he saw him write, and the other is the Book; let him fix on some part of the Book that he takes to be the Prisoner's Hand, and to be like this Letter.

L. C. Bar. Is it not enough to say he saw him write an Hour together, and he believes it to be his Hand?

Mr. Hungersf. If he made that the single Foundation, indeed, but he makes another Foundation.

Mr. Just. Pratt. If the Book was out of the Case, his having seen him write an Hour, is sufficient to found his Belief upon.

Mr. Hungersf. He makes two Things the Foundation of his Judgment; the seeing him write, and the Similitude of Hands in the Book; the most concluding Evidence wou'd be the Similitude of the Hand in the Book, which another might judge of as well as himself.

Similitude of Hands is no Evidence at all. *L. C. Bar.* Similitude of Hands is no Evidence

vidence in Criminal Cases. *Mr. Hungersf.* I do not think it is, or that there is yet any Evidence given of it.

Mr. Just. Pratt. If you had not seen the Book, but had only seen him write an Hour, cou'd you not have collected from thence that this was his Hand?

Mr. Buckley. No, I wou'd not affirm it; but my Belief

Belief is founded upon seeing him write, and that Writing being like the Book.

Mr. Just. Pratt. Since it is gone so far, I think it would be proper to clear this Matter.

Then Curtis was sworn, and the Letter was shewn him.

He depos'd, That he was in Custody of the Messenger at the same Time that *Francis* was, and that he was well acquainted with his Hand, having seen him write several Times, That the Deponent found this Letter the 27th of November, by the Prisoner's Bed-side, who told him it was a Letter to his Wife.

Mr. Att. We desire that the Interpreters, who translated the Letter out of *French* may be sworn.

Mr. Boyer, and Mr. Ozell, the Interpreters, were sworn: And depos'd,

That it was a just Translation, and the Original Letter was deliver'd into the Prisoner's Hand, while the Translation was reading, and Mr. *Flint*, who was permitted to stand at the Bar, by the Prisoner, assisted him in comparing the Original with the Translation: (As he did also the other Letters, and the Copy-book, when they were afterwards produc'd.)

The Letter was directed to his Wife, whom he exhorts, 'To be as easy as she can; and tells her, 'The Company in *Newgate* was much better than 'he expected, that they were all Tories, and the 'Major Part for the Government, that is, sent 'thither for being so, according to their Informations. That tho' my Lord *Townshend* should 'do nothing, the Business would be at an end in a 'Fortnight: That he neither knew, nor had said any thing against Mr. *Harvey*; nor cou'd they do 'any thing to him, unless he had other Affairs the Prisoner knew not of. Mr. *Harvey* might, indeed, 'be suspected of being a Friend to the Pretender; 'and if all who were so were to be punish'd, above 'three Fourths of the Nation wou'd suffer, therefore he laugh'd at any thing they cou'd do to 'him.

Mr.

Mr. Hungerf. Pray let me see the Letter: I have a little *French*, and wou'd see how they render the Word, *Torties*,----- I think my Lord *Townsbend* said the Letters that were stop'd at the Post-Office were laid on the Table with the other Letters, at the Prisoner's Examination?

L. Towns. No: I said I first laid the intercepted Letters before the King, and then put them into the same Hands with the other Letters.

Mr. Secretary Stanhope was sworn.

Mr. Secretary Stanhope's Evidence of the Prisoner's Examination.

He produc'd two Examinations; one sign'd by my Lord *Townsbend*, the 21st of *September*, the other dated the 22d of *September*, and sign'd by my Lord *Townsbend* and himself: He depos'd, That he was present at both the Examinations, and the Account that had been given of the first was very just: He depos'd further, that the Letter taken to be *Mr. Harvey's* had been before the Cabinet Council, and was there shewn to *Mr. Harvey*, who did not deny it, but shew'd the utmost Consternation on producing it, and desir'd Leave to withdraw, and speak with a particular Lord; The Council apprehended he was enclin'd to make a Discovery, and permitted him to withdraw, and go to the Messenger's House, where his Agonies were such, that he stabb'd himself, that Night, or the next Morning.

That they twice examin'd the Prisoner, and spent above two Hours in these Examinations, and there was not a Passage in them which he did not repeat more than once, or twice: That the Deponent believes the Reason why he did not sign one of the Examinations was, because he was going backwards and forwards, between the Room where the Prisoner was examin'd, and the Council-Chamber, and might not be with the Prisoner when he sign'd it; but as to that he saw the Prisoner sign, he did not observe any Reluctancy in him to sign it: And that he examin'd the Prisoner to all the Particulars in the first Examination several Times himself.

That after the Examination the first Night, the Prisoner behav'd himself as if he was not worth a Groat, and intimated, he knew not how to get a Supper, and representing his miserable Condition,

after

after he had sign'd that Examination, and was going out of the Room, my Lord Townsbend put his Hand in his Pocket, and gave him something; but how much the Deponent could not say.

Mr. Ward. Did not the Prisoner desire to read over the Examinations, before he sign'd them?

Mr. Stanhope. I don't remember that; but they were read to him, and I think I examin'd him to every Particular, in order to have it alter'd if he objected to it; and he did not express the least Reluctancy to sign them.

Mr. Ward. Was he not told, that these Examinations shou'd only be laid before His Majesty, and no other Use made of them?

Mr. Secr. Stanh. I remember no such Thing.

Sir J. Fekyl. Wou'd you have refus'd his reading them, if he had desir'd it.

Mr. Secr. Stanh. No; God forbid; it was never deny'd any Man.

Mr. Hungerf. If I am inform'd the Prisoner complain'd, in some Letters to my Lord Townsbend, that other Use was made of the Examinations than was design'd.

Mr. Secr. Stanh. I don't know he did; but if he complain'd, 'twas without any Ground.

Prisoner. I desire a Sight of the Original Letter, which Curtis says he found. (Which was shewn him.) This is forg'd since, any Body will say 'tis not like my Hand.

L. C. Bar. The Gentlemen of the Jury are desir'd to take notice of the Letters and Numbers that are explain'd in the Examination, that they may understand the Letters when they are read.

The Examination upon Oath, of Francis Francia, of London, Merchant.

He saith, 'That he became acquainted with the Prisoner's Abbot Butler (alias the Vidame of Cembray) about first Examination two Years ago, when Duke D'Aumont was here; 'That the Examinant receiv'd a Letter from Francia, 'from the said Abbot Butler, soon after the Duke 'D'Aumont went over, recommending to the Examinant's Care a Law-suit; wherein one Barbara Butler,

Butler, a Relation of the Abbot's, was concern'd; which occasion'd a Correspondence between the Examinant and the said Abbot, from a little before the Queen's Death, till within these few Days, and during that Time the Examinant receiv'd several Letters from the said Abbot, directed to Mr. Edward Harvey, of Combe; and convey'd back several Letters from Mr. Harvey, to the Abbot, which Letters from Mr. Harvey he sometimes brought to the Examinant himself, and sometimes sent them.

That while the Abbot resided at Cambray, Mr. Harvey usually brought, or sent two Letters to the Examinant; one directed to the said Abbot at Cambray; and the other was directed to the Duke D'Aumont, at the French Court; either by Mr. Harvey himself, or by the Examinant, at his Request, Mr. Harvey telling the Examinant he did not send the Letters openly to France himself, because he wou'd not be reflected on for having Friends in France; tho' he did not care a Pin if it were known, because we were at Peace with France.

That these Letters sent by Mr. Harvey to the Abbot, or Duke D'Aumont, were put in a Cover, by the Examinant, and directed to Monsieur D'Aulmay, alias Payne, at Paris: That about two Months since this Method was alter'd, and Payen, instead of inclosing his Answers to Mr. Harvey, in a Cover to the Examinant, wrote only to the Examinant, directing him to shew the Letters to Mr. Harvey. Which the Examinant did accordingly.

He explains
some Initial
Letters.

That in these Letters directed to the Examinant, and which were order'd to be shewn Mr. Harvey, he understood the Initial Letters, M. H. stood for Mr. Harvey; D. D. for the Duke of Ormond; and M. B. for my Lord Bolingbroke. And the Examinant verily believes the Subject of these Letters is, the Design of the Pretender to invade His Majesty's Dominions.

Capt. 21st de Sept. FRANCIS FRANCLIA.

L. TOWNSHEND.

The

The farther Examination of Francis Francini.

He saith that the Letter annex'd hereto, and dated the 9th of January, being Mr. Harvey's own Examination Hand, was sent by Mr. Harvey to the Examinant; in a Cover, to be forwarded to the Abbot Butler, in France, but the Examinant in opening the Cover, accidentally broke the Seal of the enclos'd Letter, which made him detain it, lest it should be thought he open'd it out of a Curiosity to read it. That he believes, by the Number 22 in this Letter, is meant Duke D'Aumont; by Numb. 6, the French King; by Numb. 17, the Tories; by Numb. 8, the Pretender; and by Numb. 9, is to be understood His Majesty; but does not well know what the Numbers 24000, or 14, stand for.

He explains the Figures in the following Letters.

Sur. 22 die Sept.

coram nobis,

FRANCIS FRANGIA.

TOWNSHEND.

JAMES STANHOPE.

Sir J. Fekyl. Now read Mr. Harvey's Letter.

Mr. Ward. You cannot read that Letter against the Prisoner.

Sir J. Fekyl. Yes, we may, as he has made it part of his Examination.

Then Mr. Harvey's Letter, dated the 9th of January, 1714. was read.

Wherein he tells Abbot Butler, he receiv'd his of the 12th, N. S. and says, he would be sure to write on his Behalf, just as he mention'd. That he remembered what the Abbot had formerly offered to him, That their Great Ones were good at Words and fair Promises, but slow at performing, if ever; therefore he tells him, as a Friend, he should lay out no more Money, till he paid him what he promis'd so long ago to remit, if the Fan--cen had not done it on Notice; he meant the 130; 4: 10 so long due: That this was but about half he was out of Pocket: That for his good Will he was sufficiently scandaliz'd, as a Friend to 22, and a Pensioner to 6; and desires the Abbot to remind 22 to send him a Bill for

Mr. Harvey's Letter read as Evidence against the Prisoner.

Here are several false Spellings, some of which are taken notice of. Quer. If they were not affected by Mr. Harvey, for some Reasons.

the

‘ the 130:4, or he shou’d look upon it as lost :
 ‘ That the Abbot only gave him fair Words, which
 ‘ was not like a true Friend ; but that he had not,
 ‘ or ever would, omit any thing to serve 6, 22, or
 ‘ the Abbot, paid or not : And, it shou’d not trouble
 ‘ him, so he had the Esteem of 22.

‘ That they were in a Hurry choosing Parliament-
 ‘ men, and if the Electors were left to themselves,
 ‘ and no Money or Threats from Corte, it wou’d be
 ‘ out of Sight on the Side of 17. As it was, he
 ‘ he hop’d all wou’d be well, if 6 and 22 wou’d stick
 ‘ to their *trew* Friends. That he cou’d not for his
 ‘ Life get 30 such Hounds as were fit for 22 to send
 ‘ to his Friend the Co---t of To---ous, but by *March*
 ‘ he hop’d he shou’d : That his good Friend Mr.
 ‘ B--ne, whom the Abbot mention’d, had given him
 ‘ two of his best Bitches, &c. These Things, he
 ‘ says, are out of his way, but to serve 6 or 22, I
 ‘ will do any thing, tho’ to hazard of my Life and
 ‘ all I have.

‘ That he had got for 22 two fine Greyhound-
 ‘ Bitches, and a Couple of Stag-hounds of the Breed
 ‘ of the Queen’s Hounds, &c. That he wou’d give
 ‘ them to any Person 22 shou’d send over with their
 ‘ Ambassador, or send them to *Dover*, on Notice ;
 ‘ For Horses, he dare not buy any till 22 sent over a
 ‘ Person to approve of them ; and then he wou’d
 ‘ send one to assist in buying as many as 6 or 22
 ‘ pleas’d to command ; but this, as Things stood,
 ‘ must be done with Caution : And he desires the
 ‘ Abbot to order Things so as not to give Offence.
 ‘ He asks the Abbot why he wou’d mention buying
 ‘ of Stuffs to 22 ; he wou’d fancy he had some Self-
 ‘ Interest : That he told 14 that 22 was his humble
 ‘ Servant, and 14 said he was a real Friend to 22,
 ‘ and that he wou’d write to him, and remind him
 ‘ of the Abbot : He bids him press 22 to think of
 ‘ his Friends, and ’twould be of Service to 6. That
 ‘ all look’d well for 8, and 9 lost himself every Day ;
 ‘ and for the 24000 it made for 8 and 61

Mr. Att. We will now shew the Nature of this
 Correspondence, and when he came into it himself ;
 from the Letters in his own Book.

Mr.

Mr. *Ward*. My Lord; the Overt Act is, That he wrote several Treasonable Letters; now they might give Evidence in general, that he did write such Letters, but we must submit to your Lordship, whether they can produce particular Letters, which are every one of them Overt Acts themselves, and are not laid in the Indictment. Obj. To read- ing the Letters, they not being particularly set out in the Indictment.

The Law has so guarded the Life of the Subject, by the 25 *Edw. 3.* that tho' the Intention is the Crime, it must be declar'd by some Overt Act or Deed, which must be charg'd in the Indictment, and by the late Act nothing is to be given in Evidence, but what is expressly laid in the Indictment: But if they may under so general a Charge prove such a Number of Facts, not particularly laid in the Indictment, then a Man will be no more able to make a Defence, than if he had been charg'd generally with conspiring the Death of the King; or that in order thereto he had been guilty of some Treasonable Practices. We insist, that they are oblig'd to specify in the Indictment, the Overt Act they will go upon.

Mr. *Hungerf.* My Lord, the Law has with great Reason guarded the Life of the Subject against Prosecutions for High Treason; for these Prosecutions are supported with great Power and Influence, and the Consequence is great to the Party, not only the Loss of his Life, but his Family is made infamous, and his Estate forfeited.

Before the 25 *Edw. 3.* indeed, every Offence, almost, was interpreted to be Treason; the imprisoning an Officer of Justice; an Officer cheating Soldiers of their Pay; and the killing a Man as he was going to lift himself; these Facts were adjudged High Treason: Some of these Cases happen'd the Circuit before that Act, and were the Occasion of making it; and that Parliament is call'd, *Benedictum*. Very uncertain what was Treason before the 25 *Ed. 3.*

'Tis true, the bare compassing the Death of the King, is deservedly made Treason, for in that *precious Life*, the Happiness of the Subject is eminently concern'd, but this Act provides, That such compassing shall be prov'd by some Overt Act, and not

by Inferences, or strain'd Constructions; this Law has been perverted for some Ages, and the Charge of Treason has been laid so loose, that the Party knew not how to apply his Defence: Several irregular Prosecutions there have been, such as Col. *Sidney's*, and my Lord *Russel's*, which occasion'd the late Act for regulating Trials, whereby it is provided, That no Evidence of an Overt Act shall be given but what is specially laid in the Indictment, that the Party might know to what Points to apply his Defence; but shou'd it be admitted, that what is done in this Indictment is sufficient to satisfy the Act, the Intent of it will be wholly eluded.

The Offence here is suppos'd to lie in the Letters, therefore the Letters, or the Substance of them, must be set forth, or they cannot be given in Evidence: In the Indictment against *Gregg*, which is an Authority of Mr. Attorney's, the Letter was set out at length.

M. Att. I was not Attorney then.

Mr. Hungerf. He has been in and out so often, I might easily mistake: But I have another great Authority, in the Case of Dr. *Sacheverel*, where all the Judges resolv'd, That the Words suppos'd to be Criminal, must be expressly specified in the Indictment; and in the Cases of *Coleman*, *Fitzharris*, and *Sidney*, the Papers suppos'd to be Criminal, or the Substance of them, are incerted in the Indictment: The Authorities both ancient and modern, are for us, as well as the Reason of the Thing, and we hope we shall have your Lordship's Opinion in Favour of this Objection.

The King's Council answer, 'tis sufficient to set forth the Design of the Letters generally. Sir *J. Fekyl.* In *Coleman's* Case, the Letters are not set forth, only it is alledg'd, They were wrote to procure Aid of the *French* King: And in this Case it is said the Prisoner wrote these Letters, to procure Assistance from *France*, for the Rebellion here: In a Prosecution for a Libel, it may be proper to set forth the Words, because the Libel is the Crime: But here the Letters are not the Crime, but the Overt Act, or Manifestation of the Crime: And to require us to set forth Letters we charge are sent to *France*, is to mock us.

The

The 25 *Edw.* 3. requires an Overt Act to convict a Man; and the 7 *Will.* says no more than that no Evidence shall be given of an Overt Act which is not expressly laid in the Indictment: This Act requires that the Overt Act be expressly laid in the Indictment, not that the Evidence shou'd be laid in the Indictment. It is not doubted, but the writing Letters to excite a Rebellion, is an Overt Act of Treason, and the only Question is, Whether the Indictment does not expressly alledge this Overt Act? The Words are, *Composuit & Scripsit & Composi & scribi Causavit seperales proditorias Epistolas notifican' resolution' ipsius Francisci, &c. ad bellum pradiet' contradictum Dominum Regem nunc movend. &c.* where the Overt Act is expressly laid, of which these Letters are Evidence.

In my Lord *Preston's* Case it is laid, That he wrote several Letters to inform the *French* King, what the Forces in the Kingdom were; and the Indictment shews the Purport of those Letters, but they are not particularly set forth; nor was this ever made an Objection at his Trial: We think, therefore, we ought to lay the Overt Act expressly, but not the Evidence of that Overt Act.

Mr. Att. The Meaning of the late Act is, That when we lay one Overt Act we shall not prove another; and this cou'd not have been done before: Now we have charg'd that the Prisoner wrote Letters, and sent them; and they wou'd have us set forth those Letters that are sent beyond Sea: If that were Law, no Man cou'd be convicted of a Correspondence Abroad: If it was charg'd in the Indictment that he wrote to great Numbers of Men, wou'd it be necessary to set forth the Names of those Men? But we need not labour this Matter; the last Statute has not alter'd the Law, as to the laying of the Overt Act, but only as to the Proof.

Mr. Sol. They can shew no Instance, where an Indictment is for carrying on a Treasonable Correspondence by Letters, that ever they are set forth in the Indictment; and of what a Length must the Indictment be, if that was requisite in this Case? Col. *Sidney's* Case is against them; for tho' there

was a whole Volume of his Writing, only the Substance of a small Part was put into the Indictment: And even in the Case of Libels, I deny that the very Words must be set out in the Indictment; for a Libel may be set out in *Latin*, which is the better and safer Way, and then if you set out the Substance 'tis sufficient. The Statute says, *No Evidence shall be given, but of Overt Acts laid in the Indictment.* Now the Overt Act here is writing Letters, the Substance whereof is expressly laid, *viz.* The notifying his Intentions to raise a Rebellion, and inviting Foreign Aid; and I know no Inconvenience can be to the Prisoner, unless he have wrote so many Treasonable Letters, that he cannot recollect them all.

But I answer farther, There are two other Overt Acts laid, besides the writing Treasonable Letters, (*viz.*) The consulting to raise a Rebellion, and soliciting Foreign Aid: And that these Letters are Evidence of a Conspiracy, I believe is not doubted, and therefore if they might not be read as Evidence of writing Letters, they might certainly to prove a Conspiracy.

The Prisoner's Council reply, *Mr. Ward.* They say we have not named one Case, where the Treason is grounded on Letters, That the Precedents, and will hardly shew a Case, I believe, where it has been otherwise: It was so in *Fitzharris's* Case; and the Reason of the Thing are for them. *Col. Sidney's* Objection was, They had not set forth the whole Book, but they had set forth entire Paragraphs, and that they ought to have done here.

They would have it, that since the 7 *Will.* the Law stands as it did before; but that was thought to be a great Point gained; and what is now offer'd, has all the ill Effects that were before the making that Act; not that a Man must be suppos'd to have wrote so many Treasonable Letters that he can't remember them; but he can't know which of his Letters will be call'd so. The Case is not unlike where a Witness is produc'd, and you examine to his Credit, you will not suffer particular Facts to not be prov'd against a Witness. to prove every Action of his Life: And the Design of

of the late Statute was, That a Man might know what to defend himself against in Prosecutions from the Crown, which usually come with a greater Weight than others, and agreeable to this have the Precedents been, when the Charge is founded upon Letters. They are about to produce a Copy-book, by that they might have set out the Letters, tho' the Originals are in *France*: The Crown suffers no Inconvenience by this Method; but the greatest Inconvenience may be to the Subject, by omitting it, he may be oblig'd, off hand, to give an Account of every Letter he has written in his Life.

Here Mr. Ward having a Hoarseness upon him sate down.

Mr. Hungerf. Tho' Mr. *Ward's* Voice fails him, I thank God I have no Defect of that sort; but I have a greater, not receiving my Instructions till late last Night; Mr. Solicitor says we have neither Reason nor Precedent for us; but I refer my self to your Lordship, whether all the Laws concerning the Trial of Treasons, and those that are to take place three Years after His Majesty's Accession, and the Death of the Pretender, were not grounded on that great Reason of guarding the Subject against Prosecutions that may be carried on with too much Severity; and that the Overt Act might be so particularly laid as to enable the Prisoner to apply himself to his Defence: To what Intent is an Overt Act laid at all, but that the Prisoner may suit his Defence to it? If it was only intended that you shou'd not give Evidence of a different Overt Act, this will be but of little Avail to the Prisoner.

It has been the Practice of late, to lay the Treason to be in conspiring the King's Death, and to lay a Conspiracy to levy War, as an Overt Act of that, which by the way makes one Branch of the 25 *Edw.* 3. redundant and useless; for then there was no need of making the levying of War a distinct Species of Treason, it being comprehended in the former: And now suppose the Overt Act had been a Conspiracy to levy War; this might be either in mustering Men, or seizing the King's Ships; which

which are so different, that a Man might be preparing to defend himself at Sea, and might be attack'd at Land, and so *vice versa*: Whereas the Intent of the Act was, That the Charge might be reduc'd to such a Certainty, as the Prisoner might know how to apply himself to his Defence.

In my Lord *Preston's* Case, he had no Copy of his Indictment, and so cou'd not be prepar'd to make Observations upon it, tho' he had Council to advise him; that might be irregular, as this is, he having no Opportunity of inspecting it; and so that can be no Authority in the Matter.

And whereas Mr. Solicitor says, to incert the Letters at large wou'd be tedious; for God's sake, is there any Competition between the Trouble of writing over two or three Skins of Parchment, and a Man's Life?

As to the Precedents, the Date and Substance of the Letters are mention'd in *Coleman's* Case; the Title of the Book, and the Paragraphs insisted on are recited in *Sidney's* Case; and in *Fitzharris's* Case, the Letter is recited *verbatim*; and in Dr. *Sacheverel's* Case, the Question was not ask'd of Indictments for Misdemeanors only, but generally of all Indictments, &c. whether the Words or Writing suppos'd to be criminal, shou'd not be recited; And if in Misdemeanors such certainly be requir'd, surely as much certainly at least is requisite in a Charge of High-Treason, where the Consequence is so much greater: So that we have both Reason and Precedent for us; and if they have any Precedent, it is before the late Act took place.

The Court L. C. Bar. I think the Overt Act here is sufficiently rule that the entirely describ'd, which is all that is requir'd by the Overt Act is Act of Parliament: The Act says, *No Evidence sufficiently describ'd, shall be given of an Overt Act not expressly laid;* which is all But if the Overt Act be expressly laid, and sufficiently describ'd, sure it is not necessary to mention that the Act all the Evidence to prove the Overt Act; here the for regulating Overt Act is sufficiently charg'd and describ'd, and Trials requires. the Design of the Letters set forth, and they produce these Letters manifesting such a Design; I am of Opinion they need not be more particularly described.

scribed. Dr. *Sacheverel's* Case made a great noise formerly, and has made some now: The Question then put was of Crimes and Misdemeanors, by speaking or writing; and the Crime of a Libel consisting only in the Words, they must be expressly laid; he might have instanc'd as well in an Action on the Case for Words, where they must be expressly laid too, and proved as they are laid.

But if one be charg'd with consulting to levy War, where Time and Place must be laid, yet all the Times and Places of meeting and consulting, or all the Persons Names at the Consult, need not be specified, or all the Words of the Consultation set forth; and, as Mr. Solicitor observes, if there was no other Act laid but a Consult to levy War, they might have prov'd it by Letters, tho' no Letter had been mention'd; but here 'tis said he wrote Letters for that Purpose, and therefore I think these Letters may be read.

Mr. Just. *Tracy*. I think the Nature of the Overt Act is sufficiently set out, when he is charg'd with writing Letters, praying Foreign Aid to assist in a Rebellion, and to set forth all these Letters in an Indictment is against Reason: But Mr. *Ward's* Objection was against reading these Letters as Evidence, and instead of shewing they are not Evidence, they take Exceptions against the Indictment it self, for Uncertainty, the Letters not being particularly set out. Which is not the Question.

Mr. Just. *Fratt*. Much has been said of the Care the Laws take to preserve the Subjects Life; we shall always take care to preserve those Laws, but we must take Care not to hazard that *precious Life*, as Mr. *Hungerford* calls it, by making it too difficult to convict Men of these Crimes: If we shou'd construe the Law as they wou'd have us, it wou'd be impossible to Convict any Man: The Overt Act is laid to be his writing Letters to incite a War against the King, so that the Letters, and the Purport of those Letters are set forth, and notwithstanding Words, 'tis that Case mentioned in the House of Lords, even in sufficient to an Information for a Libel, 'tis sufficient to set forth the Substance of the Words in Latin: Indeed if he

In an Information for
sets Latin.

sets it out *Verbatim*, if he mistakes in a Syllable he is gone; therefore the best way is to set out only the Substance. And what wou'd you be the better for the setting out the several Letters to the same Purpose? You wou'd only have the same Thing over and over again; and this satisfies the Meaning of the Act, as well as if they were set out at large; they offer you these Letters which correspond with the Indictment, if they offer any other indeed, they ought not to be read.

Mr. *Ward*. I am told there are several Hands in that Book; will your Lordship admit them to read it on that general Proof, that he own'd it for his Copy-book? Shou'd not what is his Writing be prov'd, and that which is wrote by another be prov'd to be wrote by his Order? For a small Variation of Expression may deprive a Man of his Life.

Mr. *Hungerf*. The Prisoner is not to be charg'd with every Word in that Volume, tho' he has own'd the Book to be his; tho' the Cover and the Paper be his, that does not imply he is the Author of all those Letters.

Sir *Jo. Fekyl*. They ought to have made all their Objections together, but I sha'n't stand upon that in a Case of Life: My Lord, had this Book only been found in the Prisoner's Custody, we might have been let in to read it, but when the Prisoner has own'd it to be his Copy-book of Letters, what Objection can there be to it? Had we produc'd a single Copy of a Letter, and he had own'd it to be the Copy of a Letter wrote to him, no one will doubt but it might have been read; and does not the Evidence say that he own'd this to be the Copy-book of his Letters?

L. C. *Bar*. If none of the Letters were of his Hand-writing, I think they may be read.

Then Mr. Boyer and Mr. Ozell depos'd, That the Letters were justly translated, and the Letter dated, Paris, Febr. 26. 1715. (which is 1714, O. S.) was first read, being directed to Francis Francia.

' In

‘ In this Letter, *D’Aulmay* desires *Francia*, that
 ‘ since he had gain’d some Advantage of the *Sieurs*,
 ‘ *Treacher* and *Robinson*, he shou’d not consent to
 ‘ any Accommodation for part, but make an end
 ‘ of all Matters in Dispute between them at once,
 ‘ for they had dealt very basely by him: That if
 ‘ *Francia* thought the Interest of *Sir Thomas Han-*
 ‘ *mer* might be of Service to him in this Affair, he
 ‘ might wait upon *Sir Thomas* from him, for he
 ‘ had the Honour to be one of his Friends, and he
 ‘ wou’d give him his Assistance: He tells *Francia*,
 ‘ he was sensible of *Mr. Harvey’s* Favours, and de-
 ‘ sires him to send him a true State of the Affair
 ‘ between *Mr. Harvey*, and *Duke D’Aumont*, and
 ‘ he wou’d endeavour to procure him Satisfaction.

D’AULMAY.

Sir Jo. Jekyl. We only read this for the sake of
 the Postscript.

Prisoner. This is not a true Translation.

L. C. Bar. You must shew wherein it does not
 agree with the Original.

Sir Jo. Jekyl. Read the Postscript, and let them
 shew a Mistake in that.

Clerk reads: *As I have Reasons of private Con-*
cern to know what passes in the Country you live
in, you will sensibly oblige me, in informing me of
it now and then. Be persuaded of my Discretion,
and that the State is no ways concern’d in my Cu-
riosity; nothing raises it but the Concerns of my
Wife, and her Family, who is Irish.

Prisoner. This is not translated right.

L. C. Bar. How do you translate it?

Flint. ‘ You will oblige me sensibly to inform me
 ‘ of the same. Be persuaded of my Discretion, and
 ‘ that the State has nothing in my Curiosity: The
 ‘ Interest of my Wife, who is *Irish*, excites me.

Sir Jo. Jekyl. There is no material Difference:
 Next we will read a Letter from the Prisoner to
D’Aulmay, out of his Copy-book.

This

The TRIAL of

This Letter is dated, London, March 11, 1714, and directed to Mr. D'Aulmay de Conlange, at Paris.

' In this Letter *Francia* tells *D'Aulmay*, he shall prosecute *Treacher* to a final Judgment, and there was no Occasion to make any Interest for Assistance in an Affair of this Nature, only desires him to transmit a Letter of Attorney to him.

' He tells him *Mr. Harvey* had advanc'd *D. D.* 200*l.* and the Person directed to repay him, had not done it, and desires *D'Aulmay* to intimate to *D. D.* (but not to let him know 'twas at their Desire) that 'twas not just *Mr. Harvey* should be so long kept out of his Money: He says, for News, they learnt more out of the *Paris-Gazette*, than here; where the greatest part of the House murmur'd to see the Low-Church flourish; that the latter were eager for a War, but wanted the Emperor, and Money; and adds, 'Tis strongly reported, that a Match is very forward between the Prince who is at Lorrain, and one of the Archdutchesses: Let me know what's in it, since that's essential to your Wife's Interest. And he desires *D'Aulmay* to send him 20 Ells of fine Rat-----St. Maur.

Prisoner. They have open'd all my Letters at the Post, and made this Book for me: There is not a Word of it of my Writing.

The next Letter was from D'Aulmay to Francia, and dated at Paris, 20 March, 1715.

' *D'Aulmay* tells *Francia*, he was sorry he must wait so long for a Conclusion of the Matter with *Treacher*; and desires he wou'd give him no Quarter; and that he had executed a general Letter of Attorney, and sent to *Mr. Arthur* at London, who wou'd deliver it him, if apply'd to: That he wou'd do his utmost to procure *Mr. Harvey* Satisfaction, without exposing him to any Inconvenience. He says he had follow'd the Court too long to be ignorant how to deal with their Grantees-----

Flint,

Flint. It is, *How to deal with our Lords.*

‘ He says, he wou’d endeavour to know the Time
‘ of the Marquis *D’Allegre’s* Departure, and send
‘ the Things he mention’d, and whatever else he
‘ desir’d. And adds, *As you tell me you learn the*
‘ *News of England in the Paris-Gazette, so I-----*
‘ *you that I learn from you the Marriage of the*
‘ *Chevalier St. George with the Archdutchess.*

Prisoner. It is not so in the Original.

Cl. of Arr. It is *Ch----- de St. G.*

Mr. Ward. That is no part of the Key that was
given by the Prisoner.

Sir J. Fekyl. Read it as it is.

Mr. Hungerf. Let it be read without a Com-
ment.

Mr. Ward. I desire the Jury to take notice, that
some of these Letters are not wrote by the Prisoner,
but directed to him.

Clerk goes on : ‘ ‘Tis true, there was some Talk
‘ of it, when the Peace was made with the Empe-
‘ ror, but since that Time no Mention has been
‘ made of it. That, in my Opinion, wou’d be no
‘ proper way to bring his Affairs to an happy Is-
‘ sue : A Party War wou’d best suit with his Af-
‘ fairs. God is above all, but I hope still, neither
‘ do I believe my Hopes altogether ill-grounded,
‘ Wherefore I still desire you to inform me.

D’AULMAY

The next Letter is directed to Mr. D’Aulmay
de Conlange at Paris, and dated, London,
March $\frac{10}{11}$, 1715.

‘ *Francia* tells *D’Aulmay* he shall get ----- a-
‘ gainst *Treacher* by *July*, or he shou’d fly his
‘ Country ; and adds, *Here is a Letter for Mr.*
‘ *Le D.D. which ’tis wish’d may succeed better than*
‘ *the former, which have not been answer’d, tho’*
‘ *entirely for the Affairs : Besides which, I must*
‘ *needs tell you by the bye, that Persons of 50 or 60*
‘ *thousand Crowns a Year cannot with prudence*
‘ *run the hazard of losing such Estates, unless*
‘ *more*

The TRIAL of

‘ more Encouragement be given them. You will
 ‘ be perfectly understood if you say this to some
 ‘ Person familiar with that Lord, or to himself,
 ‘ and I add from my self, That the Misfortunes of
 ‘ a certain Person are more owing to Neglect on
 ‘ your Side of the Water, than to the Party that’s
 ‘ against him: So if this continues, your Wife
 ‘ must lose all hopes.

Prisoner. They could not have made such a
 Mistake as they have done here, if it were not with
 a Design to take away my Life; for *Ses Affaires*
 they have made it *Les Affaires*, The Affairs.

But looking on the Original, it appear’d plainly
 to be an L.

The next Letter is directed to Francis Francia,
 and dated at Paris, 2 April, 1715.

‘ Where D’Aulmay says, I have deliver’d to Mr.
 ‘ Le D. D. the last Letter you directed to me for
 ‘ him, and when I insinuated that there was in it
 ‘ a Complaint for not having receiv’d an Answer
 ‘ to the former; I was particularly assur’d, that
 ‘ an Answer had been written, and even in Re-
 ‘ lation to what is due to Mr. H. That D. D.
 ‘ was concern’d Mr. H. had not been satisfied
 ‘ sooner, and desir’d he wou’d give an Account of
 ‘ his private Disbursements, as well as those for the
 ‘ Count de Thoulouse, and the whole shou’d be paid
 ‘ to Cantillon, to be return’d Mr. H. That it was
 ‘ uncertain when the Marquis D’Allegre wou’d
 ‘ set out, and desires he wou’d let him know any
 ‘ other way he might send the Things.

‘ That the Works at Mardyke were redoubled,
 ‘ by Orders from Court, but they seem’d very un-
 ‘ easy at Mr. Cadogan’s Journey to Vienna; and
 ‘ adds, I have spoken as you desir’d, to the Person
 ‘ for whom you sent that Letter, which you di-
 ‘ rected to me, and who has made the fairest Pro-
 ‘ mises in the World. And desires he wou’d ac-
 ‘ quaint him what pass’d in relation to Mr. Prior,
 ‘ since his Return to London.

The next Letter is directed to Mr. D'Aulmay de Conlange, and dated, London, March 17, 1715.

Francia tells D'Aulmay, ' That was the King himself concern'd against Treacher, 'twou'd be impossible to have Judgment against him till July, but he was sorry he did not begin with him sooner. And adds, Mr. Harvey and I shall be very much oblig'd to you, if you can find an Opportunity to have Justice done him. I am persuaded, that to deal with him in this Manner is no good Policy; and if I ever have the Honour to confer with you, I shall convince you, how by Neglects (which however are not usual with Men of your Nation) most serious Affairs have miserably miscarried. That they had no News, but of an approaching War, and that 'twas pretended the Emperor was coming into those Measures; but he did not believe it, or see any Possibility of raising Funds for a new War, when People were at their Wits End to pay the Interest of the Debts contracted in the last. He offers D'Aulmay to send him any Thing the Country afforded; and tells him, The Parliament were to meet that Day; and that they were going to see the Upshot of all the Threats, and desires him to write to Mr. Arthur, to deliver the Letter of Attorney to George Francia; for he had Reasons not to demand it of him himself.

The next Letter is directed to Mr. D'Aulmay de Conlange, and dated from London, 28 March, 8 April, 1715.

In this Francia tells D'Aulmay, ' He had receiv'd his of the 2d Instant, and given Mr. H. an Account of his Negotiation: That he believ'd they shou'd still have Occasion for his good Offices with D. D. and adds, What you say at the End of your Letter, of your having spoken conformably to what I desir'd, is sufficient; and therefore every thing ought now to be expected from your Side of the Water; that is to say, Explanations,

‘ tions, &c. That he had been oblig’d to prefer Interogatories in Chancery against *Treacher*, which would prevent his appealing thither when the Suit at Law was determin’d.

‘ That by the King’s Speech it appear’d there was yet no Alliances form’d, and by the Addreses of both Houses, they seem’d inclin’d to a War, tho’ they know not how to go about it: That three Parts in four of the House were highly incens’d, and the more because it was talk’d of impeaching several of the late Ministry, among whom was Mr. *Prior*, who was tax’d with receiving Presents from *France*, particularly a Set of Silver Gift Plate.

The next Letter is directed to Mr. D’Aulmay de Conlange, at Paris, dated, London, April ⁷/₁₈, 1715.

In this *Francia* says, ‘ I am order’d to tell you, from Mr. Harvey, that you will oblige him in desiring Mr. Le D. D. from him, to send hither somebody to fetch the Horses and Dogs, which he has had so long, or else to give Order to somebody to take them. Things are here in such a Posture, that great Caution ought to be us’d not to give Umbrage to those in Power, who may put a wrong Construction upon the least Trifles, especially since the Departure of my Lord Bolingbroke, who is look’d upon here as innocent; and People do not see how he cou’d be hurt, notwithstanding the Superiority of the Low Party in Parliament, which however is divided into two, who terribly cross each other; one of which will at last join with the Tories, if the latter are willing.

‘ He says the Dutchess of Portsmouth who was then at London, gave great Offence, by reviving that vulgar Report, at so critical a Time, That the late King James poison’d his Brother Charles.

‘ He said he had nothing to add, concerning the Affair of the Merchants; but he confirm’d all he had recommended to him to tell the Person he wrote to last.

‘ He

‘ He desires him to send a Piece of Taffety, &c.
 ‘ by some of the Marquis *De Allegre’s* Retinue,
 ‘ who was shortly expected; our Ambassador ha-
 ‘ ving Orders to take a Character upon him.

‘ He lets him know, that since what he wrote a-
 ‘ bove, his Letter of the 12th came to his Hands;
 ‘ and that there were great Debates in Parliament;
 ‘ a Member had suggested, they were illegally as-
 ‘ sembled, the King in his Proclamation having di-
 ‘ rected the People to choose Whiggs, and when
 ‘ ’twas expected that Member shou’d have been sent
 ‘ to the *Tower*, it was carried by an hundred Votes,
 ‘ the Proclamation shou’d be examin’d, which ’twas
 ‘ thought wou’d create great Divisions: And con-
 ‘ cludes, *When I have any thing particular to im-
 ‘ part, I shall do it by a strange Hand, and sub-
 ‘ scribe James Chretien, which you must take No-
 ‘ tice of; and provided you acquaint me that you
 ‘ have receiv’d this present Letter without being
 ‘ open’d, I shall be easy.*

*Another Letter directed to Francis Francia,
 dated, Paris, April 24. 1715.*

‘ *D’Aulmay* acquaints *Francia*, he had receiv’d
 ‘ his Letters of the 8th and 18th Instant, and thanks
 ‘ him for the Care of his Law-suit; and says he
 ‘ will send the Things by the Marquis *de Allegre’s*
 ‘ Retinue; and adds, *Your last was deliver’d to me
 ‘ very safe, yesterday in the Evening: Be easy as
 ‘ to that Matter, as well as to whatever Mr.
 ‘ James Chretien may write to me: Pray desire him
 ‘ when he does me the Pleasure to write to me, to
 ‘ be very particular as to Facts, and to be well in-
 ‘ form’d beforehand: In all which I rely on your
 ‘ Prudence. If during these troublesome Times
 ‘ Mr. H. shou’d think fit to make use of Mr.
 ‘ J. Chretien, he may, but his Letters shou’d be di-
 ‘ rected to my self, and I shou’d afterwards make
 ‘ what Use of them he shou’d think fit. That when
 ‘ the Dutchess’s Character shou’d be known, People
 ‘ wou’d not be surpriz’d at the Part she acted; and
 ‘ he hop’d ’twou’d produce a different Effect from
 ‘ what she expected; and says, Mr. *Le D. D.* was
 ‘ about*

The TRIAL of

about sending one of his Men for the Dogs and
Horses.

D'AULMAY.

P. S. My Lord *Stairs* has not taken any Character.

Another Letter directed to Fr. Francia, dated,
from Paris, 1 May, 1715.

D'Aulmay tells Francia, he receiv'd his of the
25th, with that of Mr. H. for the D. D. Thanks
him for the Care of his Suit; but says, in France
that honest Fellow *Treacher* wou'd have been
brought to Reason in much less Time: He desires
to hear from *J. Ch.* as often as he can, but desires
his News may be certain and very particular:
Says there was no Talk of the Earl of *Stairs* taking
a Character, nor was it known when the M.
D'Allegre wou'd set out; but they shou'd out of
hand work on the Fortifications at *Mardyke*;
from whence he might draw Conjectures, and adds,
*I am very impatient to know what passes, relating
to the Prosecution of the late Ministry,
particularly concerning the Duke of Ormond;
whose Name my Wife bears, and is his near Relation;
her Name is Butler, of Killcom, that Family may not be unknown to Mr. H. However,
the Ch. Sir Tho. Hanmer knows it perfectly well.*
That they had no News, but of daily Bank-
rumpcies among the Stock-Jobbers, and that there
was an incredible Scarcity of Money.

The next Letter is from Francia to D'Aulmay, at
Paris, dated, London, ^{May 30}
June 10, 1715.

Francia tells D'Aulmay he must send another
Letter of Attorney, that Mr. *Arthur* had being
lost. That the Day before being the Anniversary
of King *Charles's* Restoration, there were great
Riots, nothing was heard but Curses against the
present Ministry, and *Long live James the Third,
and the Duke of Ormond.*

P. S. Mr.

Mr. Harvey bids me tell you, that when there is any thing new, if he cannot write to you himself, he will cause the Sieur J. C. to do it for him.

A Letter directed to Francia, dated, Paris, August 7. 1715.

Wherein D'Aulmay tells Francia, 'He had just receiv'd his of the 1st Instant; and adds, You have Reason to be angry at the Indolence (or Supineness) you expostulate about, but be persuaded, 'tis only so in Appearance. I even hope, that by this Time you have convincing Proofs of it, and that suitable Returns are made to the good Dispositions, so that with God's Blessing upon our Friend's good Cause, he will at last (cast his Adversary.) At least no Succours or powerful Solicitations shall be wanting. He desires to hear about it as often as he can; by which he wou'd oblige Persons who in a proper Time and Place, wou'd be thankful to him.

D'AULMAT.

Prisoner. It is wrong translated; Cast his Adversary, in French 'tis Gagner sa Cause; which is, Gain his Suit.

Mr. Cowper. But he talks of powerful Solicitations on our Side, i. e. in France: What can that signify to a Law-suit here?

Another Letter directed to Francia, dated, Paris, 10 August, 1715.

In this D'Aulmay (alias, Payen) says, 'I receiv'd your last of the 5th Instant; pray be easy, and ere it be long you'll be satisfied: The chief of the Name of our Friend the Abbot arriv'd here on Tuesday Night in good Health. He is very well pleas'd, and has Reason to be so. He prepares to return home with all Speed, and will carry thither his Friends, to spend the Vacation Time. This very Moment I'm going to wait upon him: I reckon to attend him in his Journey, or be with him soon after his Departure.

PATEN.

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C c

Mr,

Mr. Cowper. Now the Correspondence is with the Duke of Ormond, before it was with Duke D'Aumont.

Another Letter, directed to Francis Francia, dated, Paris, 21 August, 1715.

'He tells *Francia* this was in Answer to his of the 12th and 15th; and adds, *Our Friend's Law-suit will shortly, God willing, be ready for Tryal; every Thing is preparing for it. The Friend my Wife's Relation has read your two Letters, with which he is very well satisfied. He desires you as well as my self, to let us hear from you as often as you can.* He says, his Wife's Relation had two Fits of an Ague since his Arrival, but was well again: That he had not heard of Mr. H. tho' he believ'd he had not chang'd his Habitation; and tells him the King had been indisposed. Says he thought half a dozen Souls of *Normandy*, and as many of *Mans*, possess'd *Treacher*, and inspir'd him with all the *Chicanes* he play'd him, and hop'd he wou'd give him *no Quarter*.

PATEN.

Mr. Cowper. This shews there was another Cause depending besides the Law-Suit: For he says, *Our Friend's Cause will soon be ready to be try'd; all Preparations are making for it.* Whereas there was no Suit depending in *France*, from whence *D'Aulmay* writes this Letter.

Another Letter directed to Francia, dated, August 24. 1715.

Wherein *Payen* says, 'I am very much surpriz'd not to have heard from you by the Post that came in Yesterday: Our Friend was at my House, expecting the same. We desire you both, Sir, not to let one Post go off without writing to us, and acquainting us with what passes, with Relation to our common Friend's Law-Suit: When you see Mr. H. assure him that all our Friends are perfectly well. The King's Health grows better and better; Heaven be prais'd! I have had so much Business

FRANCIS FRANCIÀ. Anno 1716.

707.

‘ *Business some Days past, that I could not write to
‘ Treacher, I will do it speedily, but I desire you’ll
‘ give him no Quarter.*

PATEN.

Mr. Sol. Here appears a Distinction between the
Cause of their Common Friend, and the Cause of
Treacher,

*Another Letter directed to Francia, dated,
28 Aug. 1715.*

Wherein Payen says, ‘ *I receiv’d your Letter of
‘ the 22d Instant. Were I permitted to give you a
‘ Detail of all that passes, concerning the Affair
‘ you know, you wou’d be more easy than to me you
‘ appear to be, and charge us with less Negligence
‘ than you do. I know there are favourable Mo-
‘ ments which ’tis dangerous to let slip; but then
‘ will not you agree with me, that ’tis Matter of
‘ Prudence to foresee all Inconveniences, and in or-
‘ der to that, to take such right Measures as to be
‘ able to surmount them all. This is now doing:
‘ Be persuaded of it, and that your Friends are
‘ more zealous than ever to procure you all
‘ the Satisfaction you may desire; therefore be
‘ easy some Time longer. He desires to be farther
‘ inform’d how it comes to pass, the Business with
‘ Treacher was put off, to the Month of October:
‘ And says, they were in a cruel Uncertainty there
‘ about an Affair of the last Importance; and desires
‘ him to continue writing every Post.*

PATEN.

*Another Letter directed to Francia, dated, 3 De-
cemb. 1715.*

‘ *He tells him, he receiv’d his of the 29th past:
‘ That he neither wrote to him by the last Post, or
‘ receiv’d any of his Letters: That he was sorry for
‘ the Trouble he gave him in the Law-suit with
‘ that Rogue, but hop’d by his Care he shou’d short-
‘ ly be rid of him; and adds, We have at last had
‘ the Misfortune to lose the greatest of Kings, who,
‘ as undoubtedly you know it already, died on Sun-*

Cc 2

‘ day

' day last, with all the Sentiments of Religion and
 ' Greatness that were ever observ'd in the greatest
 ' Heroes: And indeed, 'tis generally acknowledg'd,
 ' that he never was Greater, than in the last Mo-
 ' ments of his Life. That the Duke of Orleans was
 ' declar'd Regent, under whom they had Reason to
 ' expect happy Days; and adds, The Journey to Ger-
 ' many wou'd be proper enough, and I wish it may
 ' be perform'd, the rather because for the Reasons
 ' you know: Our Measures have been somewhat
 ' suspended, tho' not in the least broke; Things go
 ' on still better and better; be perswaded of it;
 ' as also that due Notice is taken of your good
 ' Will. In particular, Mr. H. must undoubtedly
 ' be where you were told, for he has not appear'd
 ' here. 'Tis true, my D.D. and M.B. are in a
 ' House within a small half- League of this City,
 ' which a private Person has lent them, but they
 ' receive there all their Friends, with whom they
 ' go to dine and sup every Day: They are both in
 ' perfect Health, and their Thoughts are very dif-
 ' ferent from those that are ascribed to them; I
 ' mean, that they are such as they ought to be; as-
 ' sure their Friends of it.

PATEN.

Mr. Denton. The next Letter is not directed; it
 came in a Cover that is lost, but it was found in his
 House, and own'd by him.

It is dated, 6 Sept. 1715. The Writer says, Your
 ' Letter of the 2d Instant was just now deliver'd me:
 ' He says he cannot satisfy him about what he wrote
 ' then, but hop'd to do it by next Post; and adds,
 ' In the mean time pray continue writing directly
 ' to me; and if you have any trusty Hand, other
 ' than your own and your Son's, it wou'd not be a-
 ' miss to make use of it: I am even of Opinion,
 ' that a Key, or Cypher, for the principal Names
 ' which you may send me, and of which you should
 ' keep a Copy, wou'd be necessary, for I will ingeni-
 ' ously own to you, that such a Precaution seems to
 ' me very necessary. And that he had enclos'd the
 ' Picture he desir'd.

PATEN.

An.

Another Letter directed to Francia, dated, 14 Sept. 1715.

' The Writer tells him, the last he receiv'd was without Date, and he ow'd him two Answers; and adds, *The Contents of your last without Date has given me great Satisfaction, as well as to all our Friends, who return you Thanks for it, and have charg'd me to assure you of it, and desire you to continue. We knew already part of what you write about our Friend's Cause, which, with God's Blessing will soon end to his Satisfaction, otherwise all Appearances wou'd be very deceitful. As for my own Cause, I cannot forbear telling you, that I am very unfortunate in having to do with so dishonest a Man, &c. That he cou'd have wish'd the Abbot had not embark'd him with such People, tho' he was perswaded he did not do it with an ill Intention. That the King went that Day to the Parliament, where the Regency was confirm'd to the Duke of Orleans.*

P A T E N.

' P. S. Tells him they went often into the Country, and he must not be uneasy if he should fail a Post, and bids him direct to Madam de Beauge, Merchant, at the *Fair-Star Rue Tirechape* = Paris = And that he should observe those two Strokes.

Mr. Att. The Correspondence beginning to be dangerous, it was to be directed to a Woman.

Another Letter directed to Francia, dated, 17 Sept. 1715.

' The Writer tells him he did not receive his of the 9th, till Friday last: That he had put the three Letters into the Post he directed him: That he had shewn D. D. the Epitaph he sent, and hop'd the infamous Author wou'd be rewarded according to his Deserts: That they had a Regent from whom they might hope every thing: That he suppos'd he must have receiv'd the Picture he sent him; and that the D. D. had had a slight Fit of an Ague; and adds, *We are here, as well as you, impatient*

The TRIAL of

'ent to attain the End propos'd: But we must take
'Patience, and be rul'd by those who are at the
'Helm.

The last Letter that was read, was directed to
Francis Francia, and dated, 23 Sept. 1715.

'Wherein the Writer says, In Answer to yours
'of the 16th Instant, I begin with telling you,
'that our Friends are much to blame to throw
'themselves so precipitately into Impatience, espe-
'cially Mr. H. to whom you shall communicate
'this Letter, as soon as you have receiv'd it; and
'tell him he must by no means think of coming hi-
'ther, as by your last you acquainted me he is pre-
'paring to do. 'Tis my D. D. who charges me ex-
'pressly with what I write to you, and who desires
'him to stay. He may easily guess at the Reason,
'which will give you all to understand, that this
'is not a Time to be impatient, but to show more
'Resolution than ever.

'He desires him to forward such Letters as should
'come to his Hands for him; tells him the Arms on
'Board the two Ships at *Havre de Grace*, were de-
'sign'd for the King of *Persia*, and therefore that
'need make no Body uneasy: Recommends himself
'and Friends to God; and says he hop'd they shou'd
'all soon be quiet, the *English* in a wise Govern-
'ment, after they had dissipated the Feuds that di-
'sturb'd them; and they in *France* under the pater-
'nal and indefatigable Care of the Duke of *Orleans*,
'who he might perceive by the List he sent him
'of the Councils, had fill'd them with the most
'worthy Persons in the Kingdom.

PATEN.

Mr. Denton. My Lord, the Time the King ac-
quainted the Parliament with an Invasion, was
the 20th of *July*, we have a Copy of the Speech.

Mr. Paxton was sworn.

And depos'd, That he examin'd the Copy of the
King's Speech that was produc'd at the Parliament-
Office, and it was a true Copy.

Mr. Hungerf. What did you examine it by?

Mr.

Mr. Paxton. By the Journal of the House of Lords. *Then the King's Speech, of the 20th of July, was read.*

Wherein His Majesty expresses his Satisfaction in The King's the Law against Riots, and says, he was sorry to find such a Spirit of Rebellion had discover'd it self, as left no room to doubt, but the present Disorders were set on Foot and encourag'd, by Persons disaffected to his Government, in Expectation of being supported from Abroad.

That the Preservation of the Constitution, and our Holy Religion were his chief Care; and he did not doubt, but their Concern for them was such, as they wou'd not suffer them to be expos'd to such Attempts as he had certain Advices were preparing by the Pretender, and carrying on at home, by a restless Party, in his Favour.

Therefore he thought it proper to ask the Assistance of the Commons, and hop'd they wou'd so far consult their own Safety, as not to leave the Nation under a Rebellion actually begun at home, and threatened with an Invasion from Abroad, in a defenceless Condition.

Sir Jo. Fekyl. In these Letters the Prisoner expresses a Desire there shou'd be an Assistance for the Pretender from France; all the Letters fall into this Design: Nay, he is anxious and impatient for the Critical Minute: The Death of the French King is lamented as a great Loss; but he is assur'd Things will revive, the Person succeeding in the Government having favourable Intentions.

And these Letters enter'd in the Prisoner's Copy-book, plainly shew the Purport of the Letters he sent over; nor did he pretend at his Examination, but they were Letters sent in Answer to his Letters, but acknowledg'd, *That the Design of them was the Design of the Pretender to invade His Majesty's Dominions.* And thus it is apparent, that he did solicit Aid, in order to an Invasion from abroad and a Rebellion at home, in Favour of the Pretender, and with an Intention to depose His Majesty.

Mr. Att. We shall submit it to the Court, upon the Evidence we have offer'd.

Exception to the Indictment, That the Prisoner is an Alien, and ought not to have been indicted as a Native.

Mr. Ward. My Lord, before we go into our Evidence, we must insist, That as the Law stands, it is impossible my Client can be guilty, in such manner as is charg'd in the Indictment; being an Alien, born at *Bordeaux* in *France*, from whence he came to *England*, and was never Naturaliz'd; therefore he does not owe natural Allegiance, or can be guilty of Treason against the King, as his natural Liege Lord, as tis laid in this Indictment. There is one Allegiance due from a natural-born Subject; and another from an Alien; the former owes Allegiance in Respect of his Birth; the latter owes but local Obedience in respect of his Protection: This Distinction is found in *Calvin's Case*, and it appears, that in an Indictment against an Alien, it must be charg'd to be against his Allegiance in general, and not against his natural Allegiance: This Distinction is also made in the Reports of my Lord *Hobart*, *Vaughan*, and *Keyling*: In the Trial of *Cranburn* and *Lowick*. *Calvin's Case* was agreed to be Law, and my Lord Chief Justice *Holt* held, that in Case of an Alien it must not be *Contra naturalem ligeantiam*, and if it were so it wou'd be ill: And it may be given in Evidence, that he is an Alien, to acquit him of a Crime charg'd to be against his natural Allegiance.

Mr. Hungerf. If the Fact is not admitted, we will call some Witnesses to prove it.

Simon Francia was sworn.

Evidence that the Prisoner was born at *Bordeaux* in *France*.

He depos'd, That the Prisoner was his Brother, and that he was born at *Bordeaux* in *France*.

Mr. Att. Are you elder than he?

Simon Francia. I am four Years elder.

Mr. Att. How can you remember what was done when you was four Years old?

Si. Francia. I don't remember the Day he was born, but we were bred up together at *Bordeaux*; we were all born in the same House.

Mr. Hungerf. What Age was you when you first remember him?

Si. Francia. I remember him when I was about six Years old; my Father and Mother then liv'd at *Bordeaux*, and I don't remember they came to *England* before that Time.

Jaques

Jaques Gonsales was sworn, on the Books of Moses; and an Interpreter was sworn, because he spoke English imperfectly.

He depos'd, That the Prisoner was the Son of George Francia, and Mary Gonsales the Deponent's Sister; and that he was born at Bourdeaux, the 26 March, 1675. N. S.

Sir J. Jekyl. How do you know he was born there?

Gonsales. I was present at his Birth; my House was overagainst my Sister's, the Prisoner's Mother, and he was afterwards baptiz'd in the Church of St. Andrew.

Mr. Hungerf. Will you admit it, or shall we call more Witnesses?

Mr. Att. Prove what you can.

Emes Lamira was sworn.

She depos'd, That the Prisoner was born at Bourdeaux, and that she liv'd there when he was born.

Mr. Att. I wou'd ask Gonsales how long the Prisoner has liv'd in England?

Gonsales. I can't tell; he has liv'd at one part of the Town, and I at the other.

L. C. Bar. Simon Francia, when did your Brother come into England?

St. Francia. He was here about twenty Years ago, when he staid about eight or nine Years, and he has been here now about six or seven Years.

Cecilia Ceres was sworn.

She depos'd, That she went to School with the Prisoner, at Bourdeaux; they were both Children there together; and he was reputed to be born in the same Street where she liv'd.

Mr. Att. If the Jury shou'd credit this Evidence, it will not acquit the Defendant: In Cranburn's Case it was held, that the Word *Naturalem* was not necessary in the Indictment, and the adding an immaterial Word therefore will not make the Indictment bad: If the Defendant's Council are not satisfied with this, I must insist that this Point be found specially.

Mr.

Mr. Just. Pratt. Are you willing to leave it to the Jury, on that single Issue?

Mr. Hungerf. That is to give up all the rest. I desire a little to enforce and apply this Evidende.

Mr. Just. Pratt. I believe where Mr. Attorney desires it to be found specially, it was never yet denied.

Sir J. Jekyl. I desire it may be found specially.

Mr. Hungerf. By all the Authorities we have in Law concerning this Matter, this Objection is held to be good, That one who is not a natural-born Subject, cannot owe natural Allegiance: And it is hard, without offering one Reason, to raise a Doubt but upon bare asking the Matter shou'd be found specially.

Mr. Att. We will debate it now, if you will.

Mr. Hungerf. With all my Heart, I am ready to speak to it.

Sir J. Jekyl. If we were to expect the Judgment of the Court now, I wou'd enter into the Debate presently, and shou'd not doubt to satisfy the Court that the Indictment was well fram'd, tho' he be an Alien born.

Mr. Hungerf. I wou'd gladly hear one Authority to support Sir *Joseph's* Opinion.

Mr. Ward's
Observation
on the Evi-
dence for the
Prisoner.

Mr. Ward. My Lord, I am Council for the Prisoner. Besides the general Charge of compassing the King's Death, the Charges in the Indictment are, his conspiring to levy War, soliciting Foreign Aid, and writing Letters to that End, and sending them.

They have produc'd a Copy-book of Letters, they say he wrote to *D'Aulmay*, at *Paris*; whether there be any thing in them that amounts to Treason, we must submit: And as to the Letters that have been read, that were sent him, from *D'Aulmay*, we say he is to answer only for what he wrote himself.

And the Hardship of his Case is, that tho' he stands indicted for writing treasonable Letters, there is not one Letter, or even the Date or Substance, specified in the Indictment; and it cannot be suppos'd he can be ready to give an Answer, or explain all the Letters he has ever wrote in his Life, on a suddain.

And

And he must still be the more unprepar'd for his Defence, having been under so strict a Confinement, that he has not been suffer'd to have the Use of Pen Ink and Paper, or any Body to come at him, unless some Persons from the Secretary's Office, to press him to some Discoveries he cou'd not make: And the having withstood such Importunities, will be one Evidence of our Innocence.

The Prisoner is a Native of *France*, and came hither to Trade, but not being very successful, was induc'd to take up a more inconsiderable Employment, and so engag'd in sending Letters, from the Gentleman that has been nam'd, for the Profit of double Postage; which is allow'd in those Cases.

We agree with the King's Council, that it is something strange, a Man shou'd enter in his Book, Letters of a Treasonable Nature; and this is a Circumstance, we say, that shews they are not so: Besides, these Copies are not like those the Law allows as Evidence, for they must be carefully examin'd: In these Entries there may be such Mistakes as a Man's Life may be lost upon; therefore you can't found so great a Certainty upon this Book, as upon the Letters themselves, or Copies examin'd and legally prov'd.

And it is the more unlikely to be a Treasonable Correspondence, in that the Prisoner employ'd no Body to attend at the Post-Office for the Letters, but waited till they were brought in the ordinary Way; or they were left at one *Everald's*, a Watch-maker, in the *Strand*, where he had lodg'd, and they lay in a common Room there, sometimes a Week together, before he had them.

The King's Council have suggested, that when the Correspondence grew more dangerous, he left off entring the Letters in his Book: But it appears in a Letter they have read of *D'Aulmay's*, he complains he had not heard from the Prisoner in three Months Time: And to suppose that the Letters that don't appear are more criminal than those that do, is a Presumption that ought not to be admitted in a Case of Life.

We can be of little Service to the Prisoner in this Case, having only heard those Letters the King's Council

Council thought fit to read; there are others, before and after, which might explain these; but the Prisoner has not been allow'd to peruse his own Book, or to have Recourse to any of his Papers. This Power of seizing Papers which may be of Use to a Man in his Defence, is something dark. It will appear also, in what low Circumstances the Prisoner was, even to the pawning of his Clothes: Now People that are concern'd in these Things are usually better supported. We shall also give Proofs of his Affection to the Government.

And under these Circumstances, if there was stronger Evidence than the Copy-book, it ought not to conclude him: We hope you will not think it probable he was concern'd in a Treasonable Correspondence, but that if any thing looks that way, it was the Mistake of him that enter'd the Copies, or that it might have been explain'd, if we had been Masters of the other Letters and of the Book.

Mr. Hungerford's Observations for the Prisoner.

Mr. *Hungerf.* Gentlemen of the Jury, You must observe that here is no direct Proof of an Intention to take away *that truly precious Life* of the King: There is none, but what is endeavour'd to be infer'd from these Letters; Here is no Consult appears, but between him and his Counting-house; there is nothing that looks like Treason in the Book; and as to what is contain'd in the Letters he receiv'd, it cannot affect him: If they had contain'd High-Treason, the Prisoner cou'd have been but guilty of Misprision of Treason, as he was privy to them.

Gentlemen, You must know that great part of the Trade and Commerce of this great City is carried on by Letters, which are usually enter'd in Books; you must have a due Apprehension of such a Transaction as this: To have a Man, living in his House in Peace, under the King's Protection, to have his Books and Papers seiz'd, and turn'd upon him, to the Destruction of him and his Family-----

Mr. *Att.* Pray forbear inveying in this Manner.

Sir *J. Fekyl.* What an Harangue is here, complaining his Papers were seiz'd; had an Information of a Treasonable Correspondence been given to the meanest

meanest Officer in the Kingdom, he ought to have done as much.

E. C. Bar. You must not arraign these Proceedings.

Mr. Hungerf. No doubt that Noble Lord had Grounds for what he did, but what they were, does not appear; and sure I have a Right to observe that all the Evidence that appears against my Client arises from the Books and Letters that were taken from him.

Mr. Att. Pray act within the Bounds of your Profession.

Mr. Hungerf. I am to be corrected by the Court, and not by you.

Mr. Just. Tracy. You ought not to reflect on their seizing the Papers.

Mr. Hungerf. I say, what is offer'd against him, is from the Papers found in his Study.

Mr. Just. Pratt. If that had been all, you ought not to have been interrupted; but you go on with Invectives to the Jury, complaining his Papers are seiz'd and turn'd upon him. Where a Reasonable Correspondence is carried on by Letters, ought they not to be seiz'd, and made Use of against him? We must not hear Invectives against Magistrates of the highest Quality, for doing their Duty.

Mr. Hungerf. I don't impeach the Legality of what is done, but say the Evidence is from the Papers found in his Custody. These Letters, you observe, are great part of them about Dogs, and Horses, and a Sum of 130 l. 4 s. and a Suit in Chancery; and for the Book, we shall prove it was not wrote by himself: And I need not observe to Gentlemen of your Figure and Circumstances, that this *Mr. Harvey*, who has been represented to be the Promoter of this Reasonable Correspondence, is at Liberty, even without a Trial; and what the Law has done for him without a Trial, I hope, by your Justice, shall be done for the Prisoner upon his Trial; namely, That he shall be acquitted.

Mr. Ward. My Lord, we shall call some Witnesses to explain one of those Letters, which mentions

Persons of 50 or 60000 Crowns a Year, and shew whom it was meant of.

Mr. Just. Pratt. Then 'twill be necessary to read the Letter again. Which was read accordingly.

Simon Francia was call'd.

He depos'd, That *George Francia* was concern'd in the Revenus in *France*, and that he was comput'd to be worth Eight or Ten Thousand Pounds, and lost it all.

Mr. Att. Does this answer the Description in the Letter, of a Man of 50 or 60000 Crowns a Year?

Sir Jo. Fekyl. Had he any Estate in Land?

S. Francia. No; only Money.

Mr. Hungerf. Do you know of any Offers or Threats that were us'd to the Prisoner?

S. Francia. Mr. Buckley offer'd, if he wou'd swear against Mr. *Harvey* of *Combe*, he shou'd have a good Reward.

Mr. Hungerf. Do you know of any other?

S. Francia. I was told by my Lord *Townsbend*, in the Office at the *Cock-Pit*, that he had given my Brother five Guineas, and if he wou'd swear against Mr. *Harvey*, he wou'd give him more.

Mr. Att. How came this Discourse between my Lord and you?

S. Francia. I was at the Office with him several Times about my Brother.

Mr. Just. Pratt. Who was by, when you had that Discourse with Mr. *Buckley*?

S. Francia. No Body else.

Mr. Just. Pratt. Who was by, when my Lord *Townsbend* said what you mention?

S. Francia. No Body: I think the first Time I applied to my Lord, there was another Secretary there.

Mr. Hungerf. What was it the other Secretary of State?

S. Francia. I dont know; there was another Gentleman.

L. C. Bar. What was it my L. *Townsbend* said?

S. Francia. He said he had given my Brother five Guineas, and wou'd give him more, if he wou'd swear against Mr. *Harvey*.

L. C. Bar

L. C. Bar. You said there was another Secretary by.

S. Francia. No, not at that Time.

L. C. Bar. Nor no Body with you and Mr. Buckley?

Si. Francia. No.

Lucy White sworn.

She depos'd, That she went to see the Prisoner in *Newgate*, the 7th of *September*, 1716. and he told her, Mr. Buckley was to be there, and desir'd her to conceal herself in the Room, that she might hear what pass'd; and she did so: And when Mr. Buckley came, he spoke about *Flint*; afterwards Mr. Buckley asked him Questions about Mr. *Harvey*, and the Prisoner said he knew nothing, but that he was innocent. And Mr. Buckley said he must swear, right or wrong, for the Government; and if he would not, he would swear High Treason against the Prisoner himself, for he had taken my Lord *Townsend's* Money, and done nothing for it.

Mr. Hungerf. Did Mr. Buckley see you?

White. No; I conceal'd my self under the Feet of the Bed.

Margaret Meggison was sworn.

She depos'd, That she was in Mr. *Francia's* Room, the 8th of *September* last, and Mr. Buckley came in, and told him he shou'd be try'd suddenly, and there were a great many Witnesses against him, and he would swear against him, because he had cheated his Master of five Guineas, and wou'd not swear against Mr. *Harvey*: That she sat upon a little Box by the Bed's Feet, and it was so dark Mr. Buckley cou'd not see her.

Mr. Att. You dwell in *Newgate* sometimes, don't you?

Mr. Att. Are you Married? What is your Husband?

Meggison. He is a Dealer, but he is not in *England* now?

Prisoner. What Room was I in?

Meggison. A little dark Room; they call it the *Lyon's Den*.

Prisoner.

Prisoner. Every Body knows that Room is so dark, People can't easily be seen it.

Mr. Hungerf. Did Mr. *Buckley* say any thing more?

Meggison. He said he wou'd bring my *L. Townsband* into Court, on purpose to influence the Jury.

Mr. Hungerf. We have several to speak to the Reputation of these Witnesses, if their Credit was doubted.

Sir Jo. Fekyl. I dare say no Body in Court believes a Word they say.

Mr. Buckley call'd again.

Prisoner. Was not you with me in the *Lyon's Den*?

Mr. Buckley. The Prisoner sent *Revel*, the Turnkey, to me, to desire to speak with me: When I came, he desir'd that *Flint* might be releas'd from his close Confinement; and then about his own Affairs: He thank'd me for my Humanity in coming to talk with him; and we parted immediately. I told my Lord *Townsband* what pass'd, and *Flint* had the Benefit of it, and was releas'd from that Confinement; which was the Business I went about. It is a little dark Room indeed, but if any one had sat at the Feet of the Bed, I believe I might have seen them.

L. C. Bar. Did you speak those Words?

Mr. Buckley. No; 'tis impossible I shou'd.

Mr. Hungerf. Not impossible, sure.

Mr. Buckley. Yes, impossible: I appeal to my Character; and desire *Revel* may be call'd.

Mr. Ward. We are now in our Evidence.

Mr. Att. Where the Prisoner calls a Witness that has been call'd before, and he, to make his Evidence entire, appeals to *Revel*, we ought to call him now.

Mr. Hungerf. If it be only to prove he was sent for Mr. *Buckley*, there is no great Matter in it, otherwise we are in the Course of our Evidence.

Revel was sworn.

He depos'd, That *Francia* told him he thought he cou'd do a Piece of Service to the Government, and suppress the publishing of *The Shift shifted*, and desir'd to speak with Mr. *Buckley*; and the next

Morning

Morning he went to him, and acquainted him with *Francia's* Desire to speak with him, and the Occasion.

Sir J. Jekyl. Was you in the Room with them?
Rebel. No; but afterwards he told me he thought he had done the Government some Service; and, says he, you do not hear it come out as it us'd to do.

Prisoner. Was not Mr. *Buckley* angry you did not stand at the Door?

Revel. He bid me stand at the Door, but there came some Workmen to survey the Chappel, and I was obliged to go to them, and he came out and was angry I was not there: Afterwards I stood there till they had done, but did not hear what pass'd.

Then my Lord *Townshend* stood up.

Ld Townsh. Mr. *Buckley* told me of the Message he received from the Prisoner about the *Shift Shifted*, a scandalous Paper that went about, and ask'd me if he should go; I said I thought it was right to go, but bid him be cautious; for I was satisfied the Prisoner was capable of all that Villany I find he is. When he came back he told me what he has now said, and I believe 'twas all that pass'd between them; for I have always found him faithful and honest: I thought it a Service to put an End to that Paper, and gave some Ease to the Person named. But I am amaz'd at the Brother's Villany; he came two or three times to the Office with Petitions, and I only told him it was not in my Power to serve him unless he would deal ingenuously, and tell all he knew; that was the way to recommend him to the King's Mercy. I believe the manner I treated Mr. *Harvey* will clear me from the Suspicion of such Intentions against him. What I did was in regard of the Prisoner's wretched Circumstances, and before Mr. *Stanhope*: Nor did I ever desire any thing of him but to tell the whole Truth.

Prisoner. You said I should be hang'd, drawn and quarter'd, and many a time you said, Damn you, you Dog, now I have got Mr. *Harvey* in my Clutches, and you will let him go from me; and if there

The TRIAL of
was no particular Spleen against me, why should I be distinguish'd? For there were none put in Irons for treasonable Practices but me.

Ld Townsh. The Warrant for Irons, and to prohibit him Pen, Ink and Paper, was after *Curtis* brought me that Letter; the Contents whereof sufficiently justify the Caution us'd in that Warrant; and treasonable Practices were then no more bailable than Treason; nor is it a new thing to fetter State-Prisoners under such an Accusation.

Mr. Ward. Does your Lordship think that *Curtis* deserv'd any Credit?

Ld Townsh. He made some Discoveries; and there was no Prosecution against him; I know nothing more of him.

Mr. Ward. Did those Informations appear to be true?

Ld Townsh. A great part did by the Confession of one of those he accus'd.

Mr. Hunger. Since it has been remark'd that the Testimony of the two Women was extraordinary, I have five or six People to speak to their Reputation, if it sticks with *Mr. Attorney*.

Mr. Attor. Perhaps such as themselves.

Mr. Everal call'd.

He depos'd, That the Prisoner's foreign Letters were left at his House, and they us'd to lie two or three Days sometimes before he call'd for them; and they lay in a publick Room where any one might see them.

Mrs. Everal call'd.

She depos'd, That the Prisoner's Letters were brought to their House, and they have lain two or three Days on a publick Table before they were fetch'd away.

Mr. Couper. When was that?

Mrs. Everal. * *About seven Year's ago.*

Mr. Couper. Have any been directed to your House lately?

Mrs. Everal. No.

Rafter was sworn.

Mr. Hunger. Shew him the Copy-Book: Are you acquainted with the Prisoner's Hand Writing?

* *Q^u.* If the Original be right, this being taken notice of by the King's Council in their Observations on the Evidence.

Rafter. Yes, and I don't take any part of the Book to be the Prisoner's Hand-writing, as far as I have gone: I believe it is his Son's; the Prisoner writes a smaller Hand.

Mr. J. Prat. Are you acquainted with his Son's Hand?

Rafter. I do not know whether it be his Son's or not; other People wrote for him sometimes.

Mr. Att. Here is a Letter that Curtis has prov'd to be his Hand: Do you believe that is his Writing?

Rafter. No, I do not think it is.

St. Francia call'd again.

Mr. Hunger. What do you say to the Book?

St. Francia. There is none of it his Writing; I have known his Hand these twenty Years.

Barwell was sworn.

Mr. Hunger. Is any of that Book the Prisoner's Writing?

Barwell. None of it.

Mr. Hunger. What State of Health was he in the latter End of the Year 1714 and 1715?

Barwell. He was sick.

Mr. Att. Whole Hand do you take it to be?

Barwell. How do I know that?

Mr. Att. Simon Francia, whose Hand do you take it to be? Are you acquainted with his Son's Writing?

St. Francia. I do not know whose it is: I don't remember I ever saw his Son write.

Doctor Cade was sworn.

He depos'd, That he was sent for to the Prisoner the 2d of November 1714, and attended him nine times between that and the 18th, and part of the time the Prisoner kept his Bed, and was lame of one of his Hands.

Mr. Ward. Which of his Hands was he lame of?

Dr. Cade. I can't remember. Neither do I know any thing of him only at that time.

Sir J. Fekyl. All the Letters were wrote after that time.

Prisoner. In what Condition did you leave me?

Dr. Cade. In a very bad Condition.

Mr. Hunger. He appears to be a Foreigner, and seems to be disinterested in our unfortunate Divisions,

The TRIAL of

that there appears nothing of Whig or Tory in his Letters.

Mr. Att. Did not he write when he came to Newgate that he lik'd his Company, for he found them all Tories?

Mr. Hunger. We shall shew he was zealous for the Good of the Kingdom, and never went into any publick Places, except the Grecian Coffee-House, which sure is not tainted with Sedition.

Mr. Everal call'd again.

He depos'd, That he had known the Prisoner several Years, and at the proclaiming the Peace, he said he thought the Nation was ruin'd; and that 'twas a scandalous Peace.

Mr. Attor. That is much when you make him a Frenchman; sure he might have approv'd it.

Mr. Hunger. Perhaps this may recommend him to your Esteem; it does not to mine. My Lord, I shall only remark, that the Foundation of this Evidence is the Confession of the Prisoner himself; without the Key given by him, this had been applicable to no Body. Great Part of this Correspondence relates to Mr. Harvey; and one would have thought, considering the Length of his Confinement, they had something extraordinary to have charg'd him with. But I need only observe to the Jury that he is at large: He was in Custody, but nothing could be imputed to him, and he is discharg'd.

Mr. John Slater was sworn.

He depos'd, That he had known the Prisoner four or five Years: That he assisted him in a Commission of Bankruptcy that was taken out against him; and that he us'd to meet him at the Grecian Coffee-House, and took him for a Frenchman: That he us'd mightily to espouse the Interest of the French King, and us'd to laugh at our Parties, and say we were a strange People to fall out among ourselves.

Thomas Richardson was sworn.

He depos'd that he had known the Prisoner five or six Years, and us'd to sit with him of Evenings, and keep him Company when he was sick, and that he often us'd to drink King George's Health, and

and he was surpriz'd to hear he was taken up ; that the Prisoner was so weak when he us'd to visit him that he could not stir Hand or Foot, and he us'd to call the Deponent *Vulcan*, and bid him drink King George's Health.

Mr. Hunger : How long is it since he was so weak ?

Richardson : About a Year and half. And when he went abroad again, I was forc'd to follow him for what he ow'd me, and have gone after him several Times to the *Gracian Coffee-house*.

Then Mr. Solicitor made his Observations on the Evidence for the King.

He said this was a Cause of great Concern to the King, to the Royal Family, and the whole Kingdom, and that it must be determin'd that Day, either that the Prisoner was guilty of High Treason, or that no Man could be convicted of holding a traitorous Correspondence, as the Law then stood.

Mr. Solicitor's Observations on the Evidence for the King.

That the Prisoner was charg'd with compassing the King's Death, which was an Offence that was compleat in the Mind, but that some open or publick Act was requisite to be prov'd to make it appear to them.

That there were three Overt Acts laid in the Indictment ; but if any one of them was prov'd it was enough ; That the Evidence consisted of Letters wrote by the Prisoner to his Correspondents in France, and of Letters wrote to him by those Correspondents, signifying the Receipt of Letters wrote by the Prisoner touching this traitorous Design : That for Proof of the Letters wrote by the Prisoner, they had produc'd his own Copy-book, wherein they were enter'd by himself or his Son ; which was indeed so rare a Way of perpetuating the Testimony of Treason, as he thought the like Evidence was never to be expected again.

That they had produc'd the original Letters from *D'Aulmay* to him, and which he confess'd to have receiv'd ; that these were an Evidence that the Prisoner sent such Letters as are mention'd in *D'Aulmay's* Letters, for these were Answers to them, and tallied exactly as to Dates, Circumstances and Subject.

That if the Prisoner had receiv'd but one treasonable Letter, his concealing it would have been but Misprision of Treason; but receiving so many, in every one of which the Writer charges him with writing High Treason; and the Prisoner preserving and concealing these Letters, was a strong Evidence of his Approbation and Assent to that Treason: And so it is where a Man falls accidentally into the Company of Traytors, and hears treasonable Discourses, this is but Misprision if he conceals it; but if he meet them a second time at their treasonable Consults, he is guilty of High Treason, because this shews an Approbation of the thing, as was resolv'd in Sir *Everard Digby's* Case.

And tho' it had been objected he was not answerable for what others wrote; this was a Mistake, for if what was written was Treason, it was his Duty to disclose it: And if he did not, but continued to receive such Letters, it was a clear Proof of his traitorous Correspondence, and by that he made the Treason his own: And tho' it was pretended he was only the Conveyer of Mr. *Harvey's* Letters, the contrary appear'd from the Letters themselves, and shew'd that the Correspondence was his own, and carry'd on by himself.

And as to the Intention of these Letters, tho' it was said they related to Dogs and Horses, 'twas true, one of Mr. *Harvey's* Letters was about Dogs and Horses; but even in that there was a good deal of Treason intermix'd: And as to his own Letters, it was not to be expected in a treasonable Correspondence that Men should speak out plain, some Cant was necessary to dress it up in. In my Lord *Preston's* Case, who was charg'd with sending treasonable Letters to *France*, there was a Cant of a Law Suit as in this; but the Chief Justices *Holt* and *Pollexfen* held that would not acquit his Lordship of Treason, if the Jury understood the Papers in the Sense that every body else did.

'Tis true, there was a private Cause committed to the Prisoner's Care; but there is a plain Distinction between the private and the publick Cause in many of D' *Aulmay's* Letters: And if Treason was not meant in these Letters, why did not the Prisoner explain what

what was meant by them? neither he nor his Council had offer'd at the Interpretation of above one in the whole Packet, and that they would interpret contrary to the very Grammar and Sense of it: But was the Meaning of these Letters doubtful? he himself sufficiently explain'd them, when he confess'd the subject Matter of them to be, *The Design of the Pretender to invade his Majesty's Dominions.*

Mr. Cowper also made his Observations on the Evidence; but they being no other than what had been before made in the Course of the Tryal, or such as are obvious to every Reader, they are purposely omitted.

Then the Lord Chief Baron proceeded to direct the Jury; and having repeated the Substance of the Evidence, he tells them, that if a Man is privy to a treasonable Design, and assents to it, and contributes to the carrying it on, it is High Treason: Indeed where one had only a bare Knowledge of it, without any other Concern in it, and conceal'd it, that was but Misprision of Treason.

The Chief Baron directs the Jury.

The Difference between Treason and Misprision of Treason.

He said it was plain from the Letters that the Cause of the Pretender was one, and the Cause of the Law Suit another; and these Letters containing such treasonable Matter, and being written to him, and found in his Custody, was a strong Evidence of his assenting and contriving to bring the Pretender over, and of his having written such Letters as were mention'd to be receiv'd from him. As to the Prisoner's being an Alien born, he thought the Proof was strong, and therefore they should find that Matter specially for the Judgment of the Court, and find the other Fact: And if they believ'd he did promote the Invasion, or conceal'd and assented to that Design, that was a conspiring the King's Death, and the Prisoner was guilty of the Treason charg'd in the Indictment.

The promoting or assenting to an Invasion held to be a conspiring the King's Death.

That as to the Threats and Promises made to *Francia* by my Lord *Townshend* or Mr. *Buckley*, they had absolutely denied it, and their Credit must be weigh'd against *Simon Francia* and the two Women who had sworn it: And as to the Prisoners Letters lying open in a Window for every Body to see them, it could not be infer'd from thence that they

were of no Consequence; for who could tell who a Letter came from, or the Contents of it, by the Supercription? nor could the Witnesses say those were all the Letters that were sent him.

That it was not material in whose Hand the Copy-book of Letters was written, if it contain'd the Copies of his Letters, as he had acknowledg'd: As to the Witnesses that spoke to his Reputation, he thought there was no great Matter in their Testimony; and concluded, that if they believ'd the Letters to be wrote to him, and by him, and that they contain'd a Correspondence of a treasonable Nature, inciting, or encouraging a War against the King, or any thing that shew'd he was privy and assisting to it, then he was guilty of High Treason; but if they did not believe they were his, or that they did not amount to such a Correspondence, then they must acquit him.

The Prisoner
acquitted.

The Jury having withdrawn some time, brought in their Verdict that the Prisoner was Not Guilty.



*The TRYAL between His Majesty King
CHARLES the First, and JOHN
HAMBDEN, Esq; in the Case of Ship-
Money, 13 Car. I. 1636.*

THE 17th of June 1635, the Lord-Keeper Co-
ventry, in his Directions to the Judges before
they went their Circuit (after having mention'd some
common Matters) told them, He had one thing
more of great Importance to give them in Charge:
He said Christendom was generally engag'd in War,
while this Nation, by the Goodness of God, and
His Majesty's provident Care, enjoy'd Peace and
Plenty. But since the neighbouring Kingdoms were
in Arms, it would be the highest Wisdom to arm
ourselves to prevent our being insulted, and taken
at a Disadvantage by any of them: Therefore his
Majesty, in these doubtful Times, had not only
commanded his Land-Forces to be in a Readiness,
but had set to Sea a Royal Fleet at his own great
Charge, but with the Assistance of the Maritime Pla-
ces of the Kingdom. He told them, that the Occasions
and Times of War, with the necessary Preparations,
were proper to the King, and dutiful Obedience in
such things best became the Subject; but the King
had been pleas'd in his Writ to declare enough to
satisfy all well-minded Men, and shew, that he
aim'd at the general Good of the Kingdom. That
the Dominion of the Sea, as it was the antient and
undoubted Right of the Crown, so it was the best
Security of the Land, therefore the guarding of the
Sea ought to be well look'd into; and those Sub-
jects who had the Honour of their King and Coun-
try at Heart, would not with Patience endure the
Dominion of the Sea to be lost. That our wooden
Walls were our best Defence; and if the Wealth
of the Kingdom was to be regarded, the Domi-
nion of the Sea was to be respected; our Wool,
Lead, and other Commodities, would fall to nothing
if we suffer'd others to be Masters at Sea: There-
fore His Majesty had thought fit to set out that
Fleet,

The Lord-
Keeper's Charge
to the Judges
concerning
Ship-Money.

Fleet, which was now at Sea ; and he found it necessary for his own Honour, and the Honour of the Kingdom, to add a greater Strength of Shipping the next Year. He had therefore, by Advice of his Council, resolv'd to issue out new Writs for setting out a greater Fleet the next Year ; and that not only to the Maritime Towns, but to all the Kingdom besides : For since all the Kingdom was interested in the Honour, Safety, and Profit, it was reasonable they should all contribute. And His Majesty requir'd, that in their Charges at the Assizes, and elsewhere, as they had Opportunity, the Judges should take Occasion to let the People know how zealous His Majesty was to preserve his own and the Kingdom's Honour, and the Dominion of the Sea, and to secure both Sea and Land, by a powerful Fleet ; that foreign Nations might see that *England* was both able and ready to preserve herself, and all her Rights ; and that they should instruct the People how just it was, that His Majesty should require this for their common Defence ; and that they were bound in Duty chearfully to contribute to it, as being the best way to confirm and continue the Peace they enjoy'd.

The Lord
Keeper's fur-
ther Instruc-
tions to the
Judges.

The 14th of *February* 1636, the Lord-Keeper *Coventry*, in his Directions to the Judges before the Lent-Assizes, observ'd, That His Majesty had three times issued his Writs, requiring the Aid of his Subjects for the guarding the Dominion of the Seas, and Safety of the Kingdom : That the first Year, when the Writs were directed to the Maritime Towns, they received little Opposition ; but the second Year, when they went through the Kingdom, they were disobey'd by some, not only in the in-land Countries, but in Maritime Places, and Actions were brought against some who were employed in executing those Writs.

He said, he suppos'd, that no Man would expect that the *Arcana Regni*, the Prince's private Reasons should upon this, or any other Occasion, be made publick. What was fit to be opened, he said, he had formerly acquainted them with in this Place. (See the first Charge.) And His Majesty was satisfied with the Charges they had given in relation

to this Affair, in their respective Circuits; and observ'd, that generally the People shew'd themselves dutiful and obedient to His Majesty in this Service; and that the Sum impos'd on the County of York this present Year, being 12000 l. was already brought in by the Sheriff; as was the greatest part of the Money laid on Lancashire, and some other Shires: But that His Majesty, having heard of some Refusals, had thought fit to advise with them, as well for his own Direction, as the Satisfaction of his Subjects; and had required them to deliver their Opinions, which they had done under their Hands. And because they had receiv'd His Majesty's Commands in a Letter, he said he would not take upon him to repeat it, but they should hear it read, and it was read accordingly, in hæc verba.

CAROLUS REX.

“ Trusty and well-beloved, we greet you well: The King's
 “ Taking into Our Princely Consideration, Letter to the
 “ that the Honour and Safety of this our Realm Judges, requi-
 “ of England, the Preservation whereof is only in- ring their Opi-
 “ trusted to our Care, was and is now more nearly nions as to the
 “ concerned than in former Times; as well by di- Legality of
 “ vers Councils, and Attempts, to take from Us Ship-Money.
 “ the Dominion of the Sea, of which We are sole
 “ Lord, and rightful Owner, the Loss whereof
 “ would be of greatest Danger and Peril to this
 “ Kingdom, and other Our Dominions: We, for
 “ avoiding these, and the like Dangers, well weigh-
 “ ing with Our selves, that where the Good and
 “ Safety of the Kingdom in general is concern'd,
 “ and the whole Kingdom in Danger, there the
 “ Charge and Defence ought to be borne by all the
 “ Realm in general; did, for Prevention of so
 “ publick a Mischief, resolve with Our selves to
 “ have a Royal Navy provided, that might be of
 “ Force and Power, with Almighty God's Blessing
 “ and Assistance, to protect and defend this Our
 “ Realm, and Our Subjects therein, from all such
 “ Perils and Dangers: And for that purpose, We
 “ issued forth Writs under Our Great Seal of Eng-
 “ land, and directed to all Our Sheriffs of all Our
 “ several Counties of England and Wales, command-
 ing

The TRYAL of

" ing thereby all Our said Subjects, in every City,
 " Town and Village, to provide such a Number of
 " Ships, well furnish'd, as might serve for this Our
 " Royal Purpose; and which might be done with
 " the greatest Equality that could be. In Per-
 " formance whereof, though generally, throughout
 " all the Counties of this our Realm, We have
 " found in Our Subjects great Chearfulness and
 " Alacrity, which We graciously interpret as a
 " Testimony as well of their dutiful Affections un-
 " to Us, and to Our Service, as the Respect they
 " have to the Publick, which well becometh every
 " good Subject. *Nevertheless*, finding that some few,
 " haply out of Ignorance what the Laws and Cus-
 " toms of this Our Realm are, or out of a Desire
 " to be eas'd and freed in their Particulars, (how
 " general soever the Charge ought to be) have not
 " yet paid and contributed the several Rates and
 " Assessments that were set upon them. And fore-
 " seeing in Our Princely Wisdom, that from hence
 " divers Suits and Actions are not unlikely to be
 " commenc'd and prosecuted in Our several Courts
 " at *Westminster*: We, desirous to avoid such In-
 " conveniencies, and out of Our Princely Love and
 " Affection to all Our Subjects, being willing to
 " prevent such Errors as any Our loving Sub-
 " jects may happen to run into, have thought fit,
 " in a Case of this Nature, to advise with Our
 " Judges, who We doubt not are all well studied
 " and inform'd in the Right of Our Sovereignty:
 " And because the Tryals in Our several Courts, by
 " the Formality in Pleading, will require a long
 " Protraction, We have thought it expedient, by
 " this Our Letter, directed to you All, to require
 " your Judgments in the Case, as it is set down in
 " the enclosed Paper, which will not only gain
 " time, but also be of more Authority to over-rule
 " any prejudicate Opinions of others in the Point.
 " Given under Our Signet at Our Court at *White-*
 " *hall* the second Day of *February* in the 12th Year
 " of Our Reign, 1636."

Then

Then the Case propos'd to the King by the Judges was read, (viz.

CAROLUS REX.

“ **W**HEN the Good and Safety of the King-^{The Case.}
 “ dom in general is concerned, and the
 “ whole Kingdom is in Danger, Whether may not
 “ the King, by Writ under the Great Seal of Eng-
 “ land, command all the Subjects of this Kingdom,
 “ at their Charge, to provide and furnish such
 “ Number of Ships, with Men, Victuals and Mu-
 “ nition, and for such time as he shall think fit,
 “ for the Defence and Safeguard of the Kingdom
 “ from such Danger and Peril, and by Law compel
 “ the doing thereof, in case of Refusal or Refrac-
 “ toriness? And whether in such a Case is not the
 “ King sole Judge both of the Danger, and when,
 “ and how it is to be prevented and avoided?

Then the Judges Answer was read, (viz.)

May it please Your Most Excellent Majesty,

“ **W**E have, according to Your Majesty's Com-<sup>The Resolu-
 “ mand, every Man by himself, and all tion of the
 “ of us together, taken into Consideration the Case Judges there-
 “ and Question, sign'd by Your Majesty, and en- upon.</sup>
 “ closed in Your Royal Letter. And we are of
 “ Opinion, that when the Good and Safety of the
 “ Kingdom in general is concern'd, and the whole
 “ Kingdom in Danger, Your Majesty may, by Writ
 “ under the Great Seal of *England*, command all
 “ the Subjects of this Your Kingdom, at their
 “ Charge to provide, and furnish such Number of
 “ Ships, with Men, Munition and Victuals, and
 “ for such time as Your Majesty shall think fit, for
 “ the Defence and Safeguard of the Kingdom from
 “ such Danger and Peril; And that by Law Your
 “ Majesty may compel the doing thereof in case of
 “ Refusal or Refractoriness: And we are also of
 “ Opinion, that in such Case Your Majesty is the
 “ sole

The *TRIAL* of

“ sole Judge both of the Danger, and when, and
 “ how the same is to be prevented and avoided.

Signed, Jo. Bramston, Geo. Crooke,
 Jo. Finch, Tho. Trevor,
 Hump. Davenport, Geo. Vernon,
 Jo. Denham, Fra. Crawley,
 Rich. Hutton, Rob. Berkley,
 W. Jones, Fra. Weston.

The King's Letter, with the Case, and the Judges Answer, being read, the Lord-Keeper proceeded in his Charge to the Judges, who were all present but Crooke.

He said, this being the uniform Resolution of the Judges under their Hands, upon every Man's particular studying the Case, and upon a general Conference among themselves, it was of very great Authority; for the Lives and Lands of the Subjects were to be determin'd by them, much more a Charge of this Nature, which would not be burthenome to any, but was of singular Use and Consequence, and for the Safety of the Kingdom.

The Judges
 Resolution enter'd
 in the
 Courts at *West-*
minster.

And to be de-
 clar'd in their
 Circuits.

That he was commanded by His Majesty to cause this their Resolution to be publish'd, and enter'd in this, and the other Courts at *Westminster*, it being a thing not fit to be kept in a Corner. And His Majesty further commanded, that the Judges should declare and publish this Resolution through all Parts of the Kingdom, that those who had been in an Error, might inform themselves, or be reform'd. However, that they should let the People know that it was not the King's Pleasure to stay any Suits which had been, or should be brought concerning this Matter, but that they should be suffer'd to proceed, and have Justice done them, so as they call'd the King's Council to attend the Proceedings. And concluded,

That if there remain'd any contrary Opinion, it must be from the Sons of the Law; and it would ill become the Son to dispute the Opinions of the Judges, who were accounted Fathers of the Law.

The

The Writ issuing out of the Court of Chancery to the Sheriff of Bucks, &c. for Assessing and Levying Ship-Money in that County, (viz.)

“ **C**AROLUS Dei Gratia, Angliæ, Scotiæ, The Writ for levying Ship-Money. Franciæ, & Hiberniæ Rex, Fidei Defensor, &c. Vic’ Com’ nostri Bucks, Ball’ & Burgens’
 “ Burgi & Paroch’ de Buckingham, Majori Ball’
 “ & Burgens’ Burgi de Chipping Wiccombe, alias
 “ Wiccombe, ac probis hominibus in eisdem Burgis
 “ & Paroch’ & Membris eorund’, & in Villis de
 “ Agmondesham, Wendover & Marlow magna, ac
 “ in omnibus aliis Burgis, Villat’, Hamlet’, & al’
 “ locis in dicto Com’ Bucks, salutem : Quia dat’ est
 “ nobis intelligi quod prædones quid’ Pirati & mar’
 “ Grassatores tam nominis Christiani hostes Ma-
 “ humetani, quam alii congregati, Naves & bona
 “ ac mercimon’ non solum subditor’ nostr’ verum
 “ etiam subditor’ amicor’ nostr’ in Mari quod per
 “ Gent’ Anglican’ ab olim defend’ consuevit nefarie
 “ diripientes & spoliantes, ac ad libitum suum de-
 “ portavere, hominesque in eisdem in captivitate
 “ miserrima mancipantes. Cumque ipsos conspici-
 “ mus Navigium in dies præparantes ad Mercatores
 “ nostros ulterius molestand’, & ad Regnum gra-
 “ vand’ nisi citius remedium apponatur eorumque
 “ conatui viriliter obviatur. Consideratis etiam
 “ periculis quæ undique his guerrinis temporibus
 “ imminet, ita quod nobis & subditis nostris de-
 “ fension’ Maris & Regni omni festinatione qua
 “ poterimus accelerare convenit. Nos volentes de-
 “ fension’ Regni, tuitione Maris, Securitati subdi-
 “ tor’ nostr’ salva Conductione Navium & Mer-
 “ chandizar’ ad Regnum nostrum Angliæ venien-
 “ & de eod’ Regno ad partes externas transeun’ auxi-
 “ liante Deo providere maxime. Cumque nos &
 “ Progenitores nostri Reges Angliæ Domini Maris
 “ præd’ semper hætenus extiter’, & plurimum nos
 “ raderet, si honor iste regius nostris temporibus
 “ depereat aut in aliquo minuat. Cumque onus
 “ istud defensionis quod omnes tangit per omnes
 “ debeat supportari prout per legem & consue-
 “ tudinem Regni Angliæ fieri consuevit : Vobis
 “ præfat’ Vicecomiti Ball’ Burgens’ Majori probis
 “ hominibus

"hominibus & omnibus aliis quibuscunque supra
 "mentionat' in Burgis, Villis, Villat', Hamlet', &
 "locis supradict' eorumque Membris in fide & li-
 "geancia quibus nobis tenemini, & sicut nos & ho-
 "norem nostrum diligitis, necnon sub forisfactur'
 "omnium quæ nobis forisfacere poteritis firmiter in-
 "jungend' mandamus quod unam navem de guerra
 "portagii quadringent' & quinquaginta dolior'
 "cum hominibus tam Magistris peritis quam Ma-
 "rinar' valentioribus & expertis centum & octogint'
 "ad minus; ac etiam Tormentis tam majoribus
 "quam minoribus pulvere tormentario ac hastis &
 "telis aliisque armaturis necessar' pro guerra suf-
 "ficien' & cum duplici eskipamento (*double tack-*
 "ling) necnon cum Victualibus usque ad primum
 "diem Martii jam proxime sequentem ad tot homi-
 "nes competen' & abinde in vigint' & sex septi-
 "man' ad Custag' vestra tam in Victualibus quam
 "in hominum Saliariis & al' ad guerr' necessar' per
 "tempus illud super defensionem maris in obsequio
 "nostro in comitiva Custodis Maris cui Custod'
 "Maris ante præd' primum diem Martii commit-
 "temus & prout ipse ex parte nostra dictaverit
 "moratur' parari & ad portum de Portsmouth citra
 "dict' primum diem Martii duci faciatis ita quod
 "sint ibi eod' die ad ultimum ad proficiend' ex-
 "inde cum navibus nostris & navibus alior' fidel'
 "subditor' nostr' pro tuitione Maris defensione
 "nostrum & nostrorum repulsioneque & debella-
 "tione quorumcunque mercatores nostros & alios
 "subditos fideles præd' in dominia nostra ex causa
 "mercatur' se diversantes, vel abinde ad propria
 "declinantes super mare gravare seu molestare sata-
 "gentium. Assignavimus autem vos Vic' Com'
 "nostr' Bucks Ball' & Major' Burgor' & Paroch'
 "præd' aut aliquos duos vel plures vestrum quo-
 "rum te præfat' Vic' Com' nostr' Bucks unum esse
 "volumus infra trigint' dies post receptionem hujus
 "brevis ad assidend' quantum de Custag' præd' super
 "præd' Burg' de Buckingham & Chipping Wiccombe
 "alias Wiccombe cum membris eorund' separatim
 "poni aut assideri debeat. Et si hujusmodi Asses-
 "sament' infra præd' trigin' dies per vos duos vel plures
 "vestrum fieri non contigerint, Tunc Assignavimus te
 præ-

" præfat' Vic' Com' nostri Bucks ad Assessamen'
 " hujusmodi super prædict' Burgos & Paroch' &
 " membr' eorund' faciend' prout rationabiliter vi-
 " des faciend' Et volumus quod de toto facto tuo
 " præfat' Vic' Bucks sub Sigillo tuo præd' Majorem
 " & Ballivos reddas certiores. Assignavimus etiam
 " te præfat' Ball' Burg' & Paroch' de Buckingham
 " ad assidend' omnes homines in eodem Burgo &
 " Paroch' & Membris ejusd' & terr' tenentes in eis-
 " dem navem vel partem navis prædict' non habentes
 " vel in eadem non deservientes ad contribuend'
 " expensis circa provision' præmissor' necessar' Et
 " super prædict' Burgum & Paroch' cum Mem-
 " bris ejusd' sic ut præfertur assidend' & ponend'
 " (viz.) quemlibet eor' juxta statum suum & fa-
 " cultates suas & portiones suas ipsi assessat' per
 " distinctiones, aliosve modos debitos levand' &
 " Collectores in hac parte nominand' & constituend'
 " & omnes eos quos Rebelles & contrarios inve-
 " neris in præmissis carcere mancipand' in eodem
 " moratur' quousque pro eorum deliberatione ulterius
 " duxerimus ordinand'. Assignavimus etiam te
 " præfat' Major' Burgi de Chipping Wiccombe,
 " alias Wiccombe, ad assidend' omnes homines in
 " eod' Burgo & Membris ejusdem & terr' tenentes
 " in eisd' navem vel partem navis præd' non habentes
 " vel in eadem non deservientes ad contribuend'
 " expensis circa provision' præmissor' necessar'; Et
 " super præd' Burg' cum Membris ejusd' sic ut præ-
 " fertur assidend' & ponend', (viz.) quemlibet eor'
 " juxta statum suum & facultates suas, & portiones
 " super ipsos assess' per distinctiones aliosve modos
 " debitos levand' & Collectores in hac parte nomi-
 " nand' & constituend' & omnes eos quos Rebelles
 " & contrarios inveneris in præmissis in Carcere
 " mancipand' in eod' moratur' quousque pro eor'
 " deliberatione ulterius duxerimus ordinand'. Et
 " ulterius Assignavimus te præfat' Vic' Com' nostr'
 " Bucks ad assidend' omnes homines in præd' Villis
 " de Agmondesham, Wendover, & Marlowe magna,
 " & in Membris eor', & in omnibus aliis Villis, Vil-
 " lat', Burgis, Hamlet, & aliis locis in præd' Com'
 " Bucks, & terr' tenentes in eisdem navem vel
 " partem navis præd' non habentes, vel in eadem

Ee

" non

The TRYAL of

“ non deservientes ad contribuend' expensis circa
 “ provisionem præmissor' necessar', & super prædict'
 “ Villas, Villat, Burgos, Hamlet, & locos cum
 “ Membris eorund' sic ut præfertur assidend' & po-
 “ nend', (viz.) quemlibet eor' juxta statum suum
 “ & facultates suas & portiones sup' ipsos assessat'
 “ per distinctiones aliove modos debitos levand'
 “ & Collectores in hac parte nominand' & consti-
 “ tuend', & omnes quos Rebelles & contrarios in-
 “ veneris in præmissis carcere mancipand' in eod'
 “ moratur' quousque pro eor' deliberatione ulterius
 “ duxerimus ordinand' Et ulterius vobis mandamus
 “ quod circa præmissa diligenter intendatis & ea
 “ faciatis & exequamini cum effectu sub periculo
 “ incumbente. Nolumus autem quod colore præd'
 “ Mandat' nostr' plus de eisdem hominibus levari
 “ faciatis quam ad præmissor' sufficiet expensas ne-
 “ cessar' aut quod quisquam qui pecuniam de con-
 “ tributionibus ad prædict' Custag' faciend' levave-
 “ rit eam vel partem inde aliquam penes se deti-
 “ neat vel ad al' usum quovis quæsito colore appro-
 “ priare præsumat; volentes quod si plusquam suffi-
 “ ciat collect' fuerit, hoc inter solventes pro rata
 “ portionis ipsis contingen' exsolvatur. Teste me-
 “ ipso apud Westm' Quarto die Augusti Anno Reg-
 “ ni nostro undecimo.”

The Substance of the abovesaid Writ in *English*.

The Substance
 of the Shipping
 Writ in *English*.

The Writ is directed to the Sheriff of *Bucks*, the
 Bailiff and Burgeffes of *Buckingham*, &c. And recites,
 That His Majesty being given to understand, that
 the Sea was infested with Thieves, Pirates and
 Sea-Robbers, as well *Turks*, Enemies to Christiani-
 ty, as others, who took and plunder'd the Ships of
 His Majesty's Subjects, and those of His Allies, who
 use to be protected heretofore by the *English* Na-
 tion: And that His Majesty considering also
 the Danger that, in these Times of War, hang
 over us, and desiring to provide for the Defence of
 the Kingdom, the Protection of the Sea, and the
 Security of his Subjects: He does therefore com-
 mand the said Sheriff, &c. upon their Faith and Al-
 legiance, that they do provide in this County a Ship
 of

of War of 450 Tons, with 180 Men, Guns, Gunpowder, Double-tackling, and all other Things necessary, and to bring her to *Portsmouth* by the first of *March* after the Date of the Writ; and to provide her with Victuals, Mariners, Wages, and all other Necessaries for twenty six Weeks, in order to proceed with His Majesty's other Ships of War, and those of His other Subjects, under the Command of his Admiral, for the Defence of the Sea, and of themselves. And the said Sheriff, &c. are farther commanded, within thirty Days after the Receipt of the Writ, to assess every Person equally within the said County, (who should have no share in the said Ship, or should not serve therein) towards the Charges of providing such Ship, &c. according to their Estates and Employments, and the Portions so assess'd to levy by Distress or other lawful Ways: And if any Person should be found rebellious, or refractory in the Premises, to imprison him till they should receive further Orders. But they are strictly commanded that they do not, by Colour of this Mandate, levy more than should be necessary for this Service: And it is declared, that if there should happen to be any Overplus, it should be return'd to the Contributors. Dat. 4 Aug. 11 Car.

In Easter Term, the thirteenth of King Charles, a *Scire Facias* issued to the Sheriff of Bucks, reciting, That whereas several Sums of Money, in a Schedule thereto annex'd, had, by Vertue of the said Writ of the fourth of August, 11 Car. been assess'd upon several Persons in that County for providing a Ship of War, which were not paid: And that upon a *Certiorari* dated the ninth of March, 13 Car. the said Sums and the several Persons on whom they were assess'd, were certified into *Chancery*, and from thence by *Mittimus*, dated the fifth of May, were sent into the *Exchequer*, that Process might be issued against the Defaulters: The Sheriff was thereupon commanded, *Quod scire faceret* to the several Defaulters; that they should appear in the *Exchequer*, Octab. Trin. 13 Car. to shew Cause why they should not pay those Sums assess'd upon them.

Mr. Hambden
appears and de-
mands Oyer of
the Writ, &c.
Mr. Hambden
demurs.

Mr. Attorney
joins in De-
murrer.

The Sheriff return'd, *Quod Scire fecit*, John Hambden, Esq; who was assess'd twenty Shillings, and had not paid it : Whereupon Mr. Hambden appear'd and demanded Oyer of the *Scire Facias*, of the Schedule, of the Writ dated the fourth of August, the *Certiorari* and *Mittimus*, and of their several Returns, and thereupon demur'd. And Mr. Attorney join'd in Demurrer ; and it was adjourn'd into the *Exchequer-Chamber* to be heard before all the Judges of England.

Mr. ST. JOHN'S Argument in the Exchequer-Chamber, on the Behalf of Mr. Hambden, in the Case of Ship-Money.

Mr. St. John's
Argument for
Mr. Hambden.

Mr. St. John. The Writ dated 4^{to} Augusti, 11 Car. being the Ground of the Process against Mr. Hambden, I shall endeavour, by breaking it into Parts, more clearly to represent it to your Lordships View.

The thing commanded is, that the County provide a Ship of War of 450 Tons, and 180 Men, Guns, Gun-powder, and all Necessaries, and bring her to Portsmouth by the first of March ; and from that time provide her with Victuals, Mariners, Wages, &c. for twenty six Weeks ; and for effecting this, there is a Power given to assess each Person within the County, *secundum statum & facultates*, and to bring in these Sesses by Distress ; & *quos Rebelles invenirent*, to imprison their Persons.

If the Writ had gone no further, the Command had been void, because it does not appear yet for what End the Ship was to be provided ; and therefore the Ends are said to be, *pro defensione Regni, tuitione Maris, Securitate Subditorum, & salva Conduitione Navium*. And the Legality of assessing every Man thereto is enforc'd by Custom, for that the Sea *per gentem Anglicanam ab olim defendi consuevit* ; and this from a common Ground of Equity, *Quia omnes tangit, per omnes debet supportari* : And this Rule of Equity back'd by the Common Law in these Words, *Prout per legem & consuetudinem Regni fieri consuevit*. Then it is further infer'd, that every Man, by his Allegiance, is bound to contribute

this Charge, the Command being in *fide & ligeancia quibus nobis tenemini*.

Now there is no Question but by the Law the Safety of the Realm is to be provided for; nor shall I pretend, that my Client ought by Law to be exempted from the Charge of the Defence of the Realm; he ought to bear the common Burthen with the rest of His Majesty's Subjects proportionably to his Estate. Nor is there any Question but the Law has entrusted the King with the Care of this Defence, and put the Militia, and Means of Defence wholly into his Hands. It is not in the Power of the Subjects to order the Way and Means of Defence either by Sea or Land, as they shall think fit: No Man may send out Ships of War, or erect a Bulwark against an Enemy, even upon his own Land, without the King's Commission, unless upon some emergent Occasion, as a sudden Invasion, &c. Nor may the Subject, without a special Commission, arm or draw Troops together; or make any general Collections of Money of the Subjects, though with their Consent.

He admits the Militia to be at the King's Command.

So that, my Lords, it must be granted, that in this Business of Defence, the *Suprema Potestas* is inherent in His Majesty, as part of his Crown and Kingly Dignity. And as the Care of the Law of England extends in the first Place to foreign Defence; and secondly lays the Burthen upon all, proportionably to their Estates; so has it also made His Majesty sole Judge of Dangers from Foreigners, and when and how the same are to be prevented. And I admit further, that the Law has given the King a Power, by Writ under the Great-Seal, to command the Inhabitants of each County to provide Shipping for the Defence of the Kingdom, and may, by Law, compel the doing thereof.

His Majesty sole Judge of the Danger threatening us.

So that the Question will not be in whom the *Suprema Potestas*, of giving the Authority to the Sheriff, which is mentioned in the Writ, doth lie; (for that is in the King); but the Question is only *de Modo*, by what *Medium*, or Method, this Supreme Power is communicated and applied; for the Law of England hath known Rules, which are necessary to be observed on these Occasions.

There is in His Majesty a twofold Power, *Voluntas*, or *Potestas Interna* or *Naturalis*, and *Externa* or *Legalis*, which, by all the Judges of England, 2 Ri. III, fol. 11. is express'd *per Voluntatem Regis in Camera*, and *Voluntatem Regis per Legem*. My Lords, we say the Forms of Law are not observed in this Case; this Supreme Power not working *per Media*, it remains still in himself as *Voluntas Regis interna*, and operates not to the Relief of the Subject: So where the King makes a Grant of Lands without Letters Patents, no Estate is transfer'd out of the King, nor by Letters Patents, but in such Words as the Law has prescrib'd: And although His Majesty be the Fountain of Justice, yet it must run in certain and known Channels; and therefore an Assize in the *King's-Bench*, or an Appeal of Death in the *Common-Pleas*, are *coram non Judice*: And altho' the Process be legal, and in a right Court, yet I conceive His Majesty alone, without the Assistance of the Judges of the Court, cannot give Judgment in any Cause.

And as without the Assistance of his Judges His Majesty applies not his Laws and Justice in many Cases, so before the 27 Eliz. if an erroneous Judgment had been given in the *King's-Bench*, the King could not have reliev'd his griev'd Subject any way but in Parliament, nor can he out of Parliament alter the old Laws, or make new, or make any Naturalizations or Legitimations: His Majesty cannot in many Cases communicate either his Power or Justice to his Subjects without the Assistance of the Parliament: And it is in Parliament that the Kingly Dignity doth most appear and manifest it self.

Now it does not appear by the Record that this Writ, which gives a Power to sell and alter the Property of the Defendant's Goods, issued from His Majesty, sitting in his State Royal in Parliament, and therefore cannot be so intended by the Court. And then the Question is, whether it be erroneously issued or no.

In the stating of this great Question, I shall present to your Lordship those known and undoubted Ways and Means, whereby the Law has provided for

The King cannot act but by such Means as the Law prescribes,

Such a Writ for Shipping cannot be issued but by Authority of Parliament.

for the Defence of the Realm both at Land and Sea, without the Way in the Writ.

The first of which is by the Tenure of Lands, &c. The King is the Root from whence all Tenures spring: Our Books agree that all the Lands within the Realm are held mediately or immediately of the Crown. As the Law hath appropriated the Defence of the Kingdom to the Kings thereof, so hath it, as one of the principal Ways of effecting it, trusted him with the Reservation of such Tenures as might serve for that purpose.

Every Man who holds by Knights Service ought to find a Man compleatly arm'd for War. He who holds by whole Knight's Fee, forty Days; and he that holds by a Moiety of a Knight's Fee, twenty Days, and so in Proportion. And in the Red-Book it is said, that there were thirty thousand Knights Fees held of the Crown in the Conqueror's Time.

Knights Service
Tenure.

And though it may be objected, that these Services were reserv'd to the King, as well in regard to foreign Wars, as those for Defence of the Realm, I conceive that these Services were to be perform'd only within the Kingdom, and in its Defence. And this appears from the Care the Law takes for the Preservation of these Services; as where the Lord purchas'd Part of the Land, the whole Service remain'd: And 7 Edw. I. the Mischief of conveying Lands to religious Houses is express'd to be, *Quod servitia quæ ex hujusmodi feodis debentur, & quæ ad defensionem Regni ab initio provisæ fuerunt, indebite subtrahantur.* And in the Charter of Hen. I. inrol'd in the Red-Book in the Exchequer, the King frees Knights Service Lands from all Gelds and Taxes; that being eas'd of them, *Apti & Parati sint ad servitium meum & ad defensionem Regni mei.* Bracton, fol. 162, says, *Les Fees de Chartre fuerunt purveans ad Defence de notre Reahne*: And a Multitude of other Authorities there are which shew these Services were instituted for the Defence of the Realm.

Statute of
Mortmain.

And 'tis observable, that these Services were not created *ex provisione hominum*, but *ex provisione legis*; for where the King grants Lands without reserving any Service, the Patentee shall hold by Knights Service in Capite, 6 Rep. fol. 7. &c. And *Stamf.*

Lands granted
from the Crown,
where no Ser-
vice is reserv'd,
are holden by
Knights Service.

All Lands An-
tiently the
Kings.

Prerog. fol. 10. Inst. 73. it is said that the Kings of this Realm had all the Lands in their own Hands; and this appears also, for that all Lands are holden mediately or immediately of the Crown, and the Law has taken Care that all to whom these Lands should be transfer'd, should by Tenure be liable to the Defence of the Kingdom.

Tenures by
Grand Serjean-
cy, &c.

And because by Knights Service the Tenant is to serve but forty Days, divers other Tenures were reserv'd; as Grand Serjeancy, Tenure by Cornage, and Castle Guard, and these, according to *Littleton*, were 11000, who were to defend the Castles and Forts within the Realm when an Enemy enter'd; and most part of these were upon the Sea-Coasts, or on the Frontiers of Scotland and Wales, the Places of greatest Danger: And besides these were petty Serjeancies, for finding all sorts of Armour for the War.

Petty Serjeancy.

And divers Privileges were allow'd to the *Cinque-Ports*, and Frontier Places, as the having all Jurisdiction within themselves, &c. not only to invite People to settle there, but that the Inhabitants might never be necessitated to leave their Dwellings, and so those Places be weaken'd and expos'd.

My Lords, His Majesty is in the actual Possession of these military Services, by taking the Profits of Wards, Marriages, Reliefs, &c. as the Fruits of them; and that these Profits were to be spent in the Wars for the Defence of the Realm, appears by divers Authorities.

Tenures reserv'd
for Sea-Service.

There were also several other Tenures that extended to the Sea-Service: *Reg. fol. 2.* among other Services is this of Shipping, specified in these Words, *Quod clamat tenere de nobis per liberum servitium inveniendi nobis quinque naves per annuale servitium.* In the *Iter Roll of Essex*, 13 *Edw. I. Rot. 7.* it is presented that the Town of Maldon tenet per Serjeanciam inveniendi unam navem quodocunque Rex necesse habuerit ire vel mittere propter negotium Regni; and from the time of the Rendezvous they were to remain in the Service forty Days *sumptibus propriis.* And several other Towns held by this Tenure of finding Ships, and commonly when the Land-Service was summon'd, these

these likewise were summon'd to the Service at Sea, 28 Edw. I. m. 15. 31 Edw. I. and 34 Edw. I. m. 15, 16, and the Summons both of the one and the other run in the same Words, (*viz.*) *Cum toto servitio vestro quod nobis debetis.* And the 13 Edw. III. Pars I. m. 11. it is declared that the *Cinquiports*, and other great Towns and Havens are franchis'd, *pur estre & mure inter nous & Aliens.*

I have done with the Services in kind; and because it was foreseen that these alone were not sufficient for the Defence, therefore other Tenures were created, whereby Rents were reserved out of the Lands for Soldiers Wages, and other necessary Affairs: All Men did not antiently inherit either their Liberties or Properties equally. The Villain, in respect of his Person, was not free, but his Lord might imprison him at his Pleasure, and tax his Lands and Goods, *de haut & de bas.*

The Freeholder had an absolute Freedom in both; and a third sort, the Tenants in antient Demesne and Burghers had an absolute Freedom in their Persons; but they were taxable for the Defence and other necessary Affairs of the Realm without Consent of Parliament. These Tenants, in antient Demesne, were to plow and manure the King's Lands; and there is an antient Manuscript which says, the Corn, and other Victuals arising thereby, was to store the King's Garrisons: But they were not taxable at the King's Pleasure as the Villains were, but only for Defence, and other Necessities of State, *Na. Br. fol. 15. 49 Edw. III. 22.*

Besides these Tenures, which the Law hath provided for the Defence of the Realm; besides the Honours, Castles, Manors, and other constant Revenues of the Crown; the Law has given divers Prerogatives to the King, which are to be employed also for the Safety of the Kingdom, and other publick Occasions.

The Reason why the King hath Treasure Trove, and Gold and Silver Mines, is declar'd to be because the King is hereby to defend the Kingdom. In the Parliament-Roll, 6 Ri. 2. 42. the Commons petition that the King will live on his own Revenues;

Villainage.

Frank Tenure.

Tenants in antient Demesne and Burghers.

Royal Prerogatives.

Customs, Ton-
nage and
Poundage.

Granted for the
extraordinary
Defence of the
Kingdom.

Stat. Winch. for
finding Men
and Arms for
Defence.

venues, and that Wards, Marriages, Reliefs, Escheats, Forfeitures, and other Profits of the Crown, may be kept to be spent upon the Wars for the Defence of the Kingdom.

And for the supporting the Charge of the Defence of the Kingdom, the King has also the Customs, and Tonnage and Poundage; of the Legality whereof I shall not speak at present: For if His Majesty may impose on Merchandize what he pleases, there will be less cause to tax the in-land Counties: And in case he cannot do it, it will be strongly presumed that he can much less tax them.

That the Aids and Subsidies, and likewise Tonnage and Poundage before they were granted for Life, were not only for the Protection of Merchants, and the ordinary Defence of the Sea, but also for the Defence thereof in Times of extraordinary Danger, and from Invasions by Enemies, appears by the several Grants of them in the Parliament-Rolls.

And when they came to be granted for Life, it appears by the 12 Edw. IV. 13. they were not only granted for the ordinary Defence of the Realm, and principally of the Sea, but that the King might always have in Readiness a Stock of Money to withstand an Invasion, as is declared by the very Words of those Statutes.

My Lords, His Majesty is in Possession of them; and, by his Proclamation, shewing the Cause of the Dissolution of the Parliament, he declares they were granted to his Progenitors for the Defence of the Seas, and the Safety of the Realm; and that he receives them for that Purpose. By the Statute of Winchester, 13 Edw. II every Man, according to the Quantity of his Lands and Goods, is to find Horse and Armour for the Defence of the Realm; and by 3 Hen. IV. each Man is to find Armour against Invasions.

Now the Service of the Cinque-Ports, and Tonnage and Poundage, and the other Duties are the ordinary, settled and known Ways by Law appointed for the Defence of the Seas: The way in the War, by selling and altering the Property of the Subjects Goods, without their Consent, must be granted

granted to be a way more unusual and extraordinary. And against the Legality of it, I shall frame my Argument, first, by way of Admission.

That in case the Service of the Ports had been summon'd, and the Money arising by the above mention'd Ways had been expended in the Defence of the Kingdom, and these had not been sufficient; suppose in this Case the Writ had been legal, yet, as it is now, it is not; for it is a Maxim, that we are not to have recourse to extraordinary Means when the ordinary will serve turn. For Instance, no Man can sue in *Chancery* when he may have a Remedy at Common-Law: Nor shall any Man be try'd by a Court-Martial while the Civil Courts are open, and he may be try'd by a Jury: Extraordinary Ways are only to be taken in Cases of Necessity; nothing else can warrant them.

Extraordinary Means not to be used when the ordinary will serve.

Having done stating the Question: The Things I shall now insist upon are these:

1. Admitting the ordinary Means above mention'd had been all used, and had not been sufficient; whether His Majesty, without Consent of Parliament, may, in this Case of extraordinary Defence, alter the Property of the Subjects Goods.

2. I shall answer some Objections that may be made to the contrary.

3. I shall admit that in some Cases the Property of the Subjects Goods, for the Defence of the Realm, may be altered without Consent in Parliament.

4. I shall answer some Authorities that may seem to prove a Legality in this Particular of Shipping for the Defence of the Sea.

1. For the first, that to the altering the Property of the Subjects Goods, though for the Defence of the Realm, a Parliamentary Assistance is necessary.

Parliamentary Assistance necessary for altering the Property of the Subjects Goods.

This may be prov'd by the Aids and Subsidies granted in Parliament. All the Summons's to Parliament shew the Cause of calling them to be *pro quibusdam arduis negotiis nos & defensionem Regni nostri Anglie & Ecclesie Anglicane concernentibus*; and in the Conclusion the Party summon'd is to be there, *sicut honorem nostrum & salvationem & defensionem Regni & Ecclesie diligit*. And in all the antient Summons

to Parliament, when Aid was demanded, the particular Cause of Defence, and against what Enemy were specified. *Claus. 5 Ric. II. M. 2. Dorset*, the King being to make a Voyage *pro defensione Regni*, which could not be done without borrowing great Sums of Money, the Parliament was call'd to advise about the Assurance; so that 'tis plain the Law hath provided this Parliamentary Way for supplying the King's Wants for the extraordinary Defence, and has put the Power of using it into His Majesty's own Hands, for he may call the Parliament as often as he pleaseth: And the Aids demanded by former Kings, and granted in Parliament for this Defence in Times of imminent Danger are so frequent, that I shall forbear citing any of them. It's rare in a Subject, and more in a Prince, to ask, and take that of Gift, which he may and ought to have of Right.

Another way of raising Money for the ordinary and extraordinary Defence of the Realm, was by Loans and Benevolences, with a Promise of Repayment; of these also there were numerous Instances.

A third way of raising Money was by anticipating their Rents. *Trin. 29 Edw. I. Rot. 58*, in the *Exchequer*, Writs went to all the Sheriffs of *England*, *pro Salvatione Regni ejusq; Incolarum Salvatione & Inimicorum Depressione*: That all the Profits arising out of their Counties, and the Rents of all the King's Tenants, due at *Michaelmas*, be paid at *Midsummer*, and Allowance promis'd in the next half Year's Rent. And can it be suppos'd, that so many of our greatest Princes should condescend so far as to borrow that of the Subject, which, without being beholden to them, they might take of Right?

Another Reason against this way of raising Money by Writ, is the Uncertainty of it. The Law delights in Certainty, to the End the Subject may be sure of something he may call his own; and therefore has made all those Things the King challenges as peculiar to himself from the Subject either certain in themselves, or else reduceable to a Certainty, either by the Judges, Jury or the Parliament. As in all Cases, where the Party is to be amerc'd,

amerc'd, though he is in *Misericordia Dom' Regis*, yet the Jury find the Amerciament : And when it is to make Fine and Ransom *ad voluntatem Domini Regis*, yet this Fine must be set by the Judges ; and when the Tenant by Knight's Service makes Default in the Summons *ad exercitum*, when he is to pay Escuage for his Default ; this cannot be set but in Parliament.

Now if His Majesty, as in the Writ, may, without Parliament, lay twenty Shillings upon the Defendant's Goods, why may he not, by the same Reason of Law, lay twenty Pounds, and so *ad infinitum* ? And then if the Subject has any thing at all, he is not beholden to the Law for it, but it is left entirely in the Mercy and Goodness of the King.

I shall next produce some Authorities to shew, that His Majesty cannot, without Parliament, tax his People, even for setting forth Land-Forces for the Defence, for making and maintaining of Forts and Castles for Defence, for Victuals for a defensive Army, for Maintenance of Prisoners taken in a defensive War, for Pledges and Hostages given to foreign States, or for the keeping of the Peace ; and if it cannot be in all or any of these Particulars, the five Supports of a defensive War, I submit it to your Lordships whether it can be done at all.

As to the first Particular, (*viz.*) the charging the Subject for finding of Soldiers to go out of their County for the Defence of the Realm : I admit, that every Man, after the Statute of *Winchester*, *secundum statum & facultates*, was to find all manner of Arms, as well for the Defence of the Realm, against Foreigners, as for the Peace : And that upon a sudden Invasion, they are compellable to travel out of their own Counties, and so for appeasing any notable Rebellion, where the King goes in Person, as appears by 11 Hen. IV. cap. 1. & 18. And I shall admit that so long as they remain at Home, and go not out of their Counties, they are to have no Wages. But that the Subjects are taxable for Wages or Victuals, or otherwise, for finding of Soldiers out of their Counties for Defence

The Militia to receive Wages of the King on their marching out of their Counties.

fence of the Kingdom, or that any are compellable to do it at their own Charge, I shall deny.

Indeed, before *Edward* the Third's Time Commissions have issued out of Chancery for that purpose; but to balance that, it is clear that whole Armies, even of 30000 Men, over and above those who were summon'd by their Tenure, have been maintain'd at the King's Charge, from the time they departed out of their Counties, during the whole Service. By the Statute of 19 *Hen. VIII. cap. 1.* those that have Annuities of the King must attend him, when the King in Person goes for the Defence of the Realm, or against Rebels; but there is a *Proviso*, that they shall have Wages from the time they set out. And upon a Rebellion in the North, 28 *Hen. VIII.* against which the King intended to go in Person, Privy-Seals were sent to most of the Gentry to attend the King with the best Retinue they could make, and to bring the Bills of their Expence, and Payment was promis'd.

And as to the finding Victuals, the Statute of 14 *Edw. III. cap. 19.* is, That for the Wars the Provision for them shall be done by Merchants, without Commission, or other Power from the King; and that the People shall not be compelled to sell against their Wills, and this was not introductive of a new Law, but was so at Common Law before.

My Lords, Then as to the Defence; when those who serv'd on Horseback lost their Horses, the King always paid for them, as appears, 24 *Edw. I. Rot. 16 Dorset*. *Robert Higham* recovered twenty Marks in the Exchequer, *pro Equo perduto in Conflictu Dover inter homines Regis & inimicos Francie*; and in the ninth of *Edw. II.* *Richard Walgrave* recovered for Horses lost at Carlisle.

Also when Frontier Towns and Castles were besieged the King bore the Charges, as appears by the Allowances in the Exchequer, *Trin. 27 Edw. I. Rot. 47 pro tuitione Newcastle contra Scotos qui hostiliter Regnum in partibus illis invaserunt.*

And as to the Charge of Prisoners taken in defensive Wars, the Allowances for it in the Exchequer are

are so frequent that I shall only cite the Conflict at Dover, before spoken of, 4 Edw. II. Rot. 22. Dors.

The next Proof I shall offer is, that of borrowing Money by the King for the Defence of the Realm; and such Money has not only been repaid upon Petition, and Grace, but it has been recover'd by Suit in the ordinary Courts of Justice; *Com.*

Money lent for the Defence of the Kingdom recover'd in the ordinary Courts of Law.

Pasch. 31 Rot. 41. 149 l. borrow'd of Henry Thomson pro defensione Regni, was sued for, and Repayment ordered. And Pasch. 29 Edw. I. Rot. 18 the King pro urgentissimis Regni negotiis, & defensione totius Regni, had seiz'd divers Sums of Money in all the Abbies, Cathedrals, and Religious Houses, and promis'd Payment; and being petition'd for it in the Parliament at Lincoln, he promises Repayment, Ita quod Regis Conscientia super hoc exoneretur.

Now if the King had apprehended, when he wanted Money for the Defence of the Realm, he might have charg'd his Subjects, he would never have answer'd he would repay it *ad Exonerandum Conscientiam*; for then in Equity and Conscience the Parliament should have taken Care to satisfy such Debts.

Now as to the Authorities by Act of Parliament, I shall first offer the Summons: The *Ardua Negotia*, for which they are call'd, are principally *defensionem concernentia*, by which is not intended their Advice about it, but the Supplies and Aids for this Defence; and that these Aids cannot be rais'd without their Consents is infer'd from this, that the Knights of Shires are to have *plenam & sufficientem auctoritatem pro se & Comitatu Comitatus præd' ad faciend' & Consentiend' to the things in negotiis ante dictis.*

The first Act of Parliament I shall mention is 4 Will. I. where he grants, that all Freemen should hold their Lands and Possessions *libere ab omni exactione injusta & ab omni tallagio, nisi servitium suum liberum quod de jure nobis facere tenentur*: This shews that the Subject was not to be charg'd for the Defence further, or otherwise than by his Tenure.

Statutes enacting that the Subject shall not be tax'd but in Parliament.

The next Statute I shall cite is that of Romney Mead, the 17th of K. John, where are these Words: *Nullum Scutagium vel auxilium ponat in Regno nostro nisi per*

per Commune Consilium Regni nostri, nisi ad Corpus nostrum Redimend, &c.

The next Statute is the 25 *Edw. I. cap. 5, 6.* where it is granted, that such Aids as had been taken for the Wars, should not be brought into Custom, and that he will take no such Aids but by common Consent in Parliament.

And by the Statute *de Tallagio* made afterwards, it is granted, that no Talliage or Aid shall be taken without Consent: And it appears that the Grievances that procur'd this Statute were Exactions made by the King for the Defence of the Realm. And I conceive it cannot be prov'd, that this King, or any of his Successors, ever claim'd a Power of laying Aids or Talliages upon them, for the Support of their private Estates, abstracted from the Defence of the Realm.

By the Statute of 14 *Edw. III. cap. 1.* the People shall not be compel'd to make any Aid, or sustain any Charge but in Parliament.

The next Statutes I shall cite are the Statutes of 25 *Edw. III.* and 1 *Rich. III.* against Loans and Benevolences, which being equally dangerous to the Subject, because of the Displeasure of the Prince on a Denial, procur'd these Statutes.

The third of King *Charles* a Commission issued, the End whereof was for aiding the King's Allies beyond Sea, and for the Defence and Safety of the Kingdom. This was a Commission to tax the Subjects in time of Necessity for Defence; but the last Parliament this Commission was condemn'd by both Houses, as against Law, and cancel'd in His Majesty's Presence.

I shall now proceed to answer some Objections: As to those Authorities, the 13 *Hen. IV. 14, 16.* that the King may charge his People without a Parliament for their common Benefit; and Instances of Pontage and Murage: I agree the King may grant both these as he may Tolls upon the Erection of a new Fair. But I answer these Grants do charge *Venalia* only, that is, Goods carried to those Places for Sale; but that he may lay a Tax either upon the Hundred or County, *secundum statum & facultates*, I shall deny. As

The King may grant Tolls, Pontage and Murage.

As for Tolls, Pontage and Paveage; it is but reasonable those who receive the Benefit by bringing their Goods to the Market, or over the Bridge, should contribute to the Charge of maintaining them. And there is no Reason, in respect of the Town, to whom Murage and Paveage are granted, why they should not be charged, because the Grant cannot be but at their own Suits; for if it be not at the Suit of *the Burghers*, the Grant is void and to be revok'd.

But it may be objected; that as His Majesty is entrusted with the Way and Manner of managing a defensive War, so he ought to be with the Aids, being the Means, the *Causa sine qua non*; and ought not to depend on the Parliament for them.

To this I answer, His Majesty has the same Power of engaging in a foreign War as a defensive War; and if this Argument would hold, he might as well tax the Subjects for making new Conquests; and that he has not this Power I presume will be easily granted.

As to that other Objection, That the Case may be such as cannot wait for a Parliamentary Supply.

I shall not enquire how such considerable Enterprises can be so secretly carried on, as that the Nation should have no Notice of them; but I observe, the Summons of the Tenants by Knights-Service gives them the same time to prepare themselves as the Summons to Parliament gives.

And Tonnage and Poundage, when first granted for Life, was given, that the King might always have Money ready upon an Emergency. And in the Parliament-Roll, 2 Ri. II. where it appears the King could not stay for a Parliamentary Supply, it was held that the Commons, without a Parliament, could not be charg'd, and therefore the great Men, that were assembled, agreed to lend the King Money.

In the Statute, 31 Hen. VIII. the King is empowered to raise Money by Proclamation; for that sudden Occasions sometimes happen'd which requir'd speedy Remedies; but here they except their Lands, Goods, and Chattels. And this shews
F f that

He holds that even in Cases of Necessity Money cannot be levy'd but in Parliament.

that the King could not, before that, upon any Exigency seize their Goods at the common Law.

A Commission
of Loan, 2 *Car.*
held illegal.

The last Authority I shall produce for answering this Objection is the Commission of Loan, 2 *Car.* wherein 'tis recited, that great and mighty Preparations, both by Sea and Land, did daily threaten the Kingdom, and the Safety of the King and People, and the common Cause of Christendom was in apparent Danger, &c. and would not admit of the Delay of calling a Parliament; therefore the King, enquiring into all Means just in such Cases, had resolv'd to borrow Money of the Subject for their Safeties, and promiseth Repayment; and yet this Commission was adjudg'd by both Houses of Parliament to be void in Law by the Petition of Right presented to his Majesty, and the King does not deny it.

In Cases of absolute Necessity Property ceases.

As in time of open War, &c.

But I shall admit that the Danger sometimes may be such, that the Subjects Goods may be taken without their Consent; for Property being both introduc'd and maintain'd by humane Laws, all things by the Law of Nature being common, there may be such Times when Property may cease, and all things be resolv'd again into the common Principles of Nature: As pulling down Houses in a Fire, making Forts upon other Mens Lands, or with their Goods, upon sudden Assaults: Also in Times of War, when the Courts of Justice are shut up, and the King in the Field: In these Times I shall admit that not only his Majesty, but every Man that has Power in his Hands, may take the Goods of any Man, pull down their Houses, or burn their Corn, to cut off Provisions from the Enemy, and do all other things that may conduce to the Safety of the Kingdom, without respect to any Man's Property, 12 *Hen.* 8. 2 *Br. trans.* 406. 8 *Ed.* 4. 23.

An Alien loses the King's Protection on proclaiming War against his Sovereign.

Also when the King proclaims War against another Nation, the Law takes notice of its Effects; the Subject of such Nation cannot afterwards prosecute any Suit in his Majesty's Courts; nay, any of the King's Subjects may seize such Foreigner's Goods, and keep them to his own Use, 7 *Ed.* 4. 13. 13 *Hen.* 8. *Br. Property.* 38 & 22 *Ed.* 3. 16.

But

But it does not appear by the Writ that War is proclaim'd against any Prince, or State; so that the Point is, Whether in time of Peace his Majesty may, without Consent of Parliament, alter the Property of the Subjects Goods for the Defence of the Kingdom? And it appears by the Record before your Lordships, by the Writ it self, that the time for bringing in the Supply is seven Months; therefore the Necessity in respect of time was not such, but that a Parliament might have been call'd in that time, and rais'd a Supply: It is aver'd indeed that *Salus populi periclitabatur*, but this is too general. In what manner *periclitabatur*, *non constat*: Now where the Subject has a Protection, as being taken up in *negotiis regni*, if he would make use of it, he must shew in particular in what Town or Castle, or other Service he was in, that the Court may judge whether the Cause be sufficient, and yet that is the King's Writ as well as this.

I shall now shew that this being for the Defence of the Sea, does not alter the Case: And whereas it is said that *Danegelt* was heretofore impos'd for the resisting the *Danes* Incursions by Sea; I answer, that this seems to have been impos'd by Parliament: As is probable from *Ingulphus*, London printed, fol. 488. Where Anno 833, about thirty-three Years after the *Danes* first Invasion, a Deed to the Abbot of *Crowland* runs thus: *Coram Pontificibus, Proceribus, & Majoribus totius Anglie in Civitate London, ubi omnes congregati sumus pro Concilio capiendo contra Danicas Piratos litora Anglie assidue infestantes*. And Sir Henry Spelman in his *Glossary* saith, that when it was taken in the Conqueror's Time, and since, it was *Consultis Magnatibus & Parliamentar' demum autoritat' dimittunt' sunt*.

And tho' it be said, succeeding Kings, *mutato nomine*, have in lieu thereof laid other Taxes, and that King *Ethelred*, when the *Danes* landed at *Sandwich*, in the Year 1006, taxed all the Realm by Hides, every 910 Hides of Land to find a Ship: I answer first, that this was when a formidable Enemy was landed, who soon after conquer'd the Kingdom, and probably the Courts of Justice were then shut, and the King in the Field. And secondly, That this

is but a single Instance. And thirdly, This might be done by Parliament for ought appears.

And as to the Case of the Abbot of *Robertsbridge*, who was affess'd to find a Horse and Man, and also a certain Sum for the Defence of the Kingdom; I observe, that the Service was to be perform'd in the County of *Kent*, where the Land lay, which I have already admitted by the Statute of *Winchester* he might be compell'd to perform.

But further, as to that Sess on the Abbot: It appears that this was in a Time of War, as well with *France* and *Scotland*, as *Wales*; and the *French* had landed in divers Parts of the Kingdom, and particularly in *Kent*.

And 2. There was a Parliament at this time, and by what Authority this was done, does not appear; and I shall endeavour to shew that this has been done by way of By-law, made by Agreement of the Gentry and other Inhabitants among themselves, and that such By-laws are good: See 14 *Ed. 2. B. R. Rot. 60.*

By-laws for
common De-
fence held to be
good.

The *Scots* entring *Durham*, a By-law was made by the Inhabitants for raising Money, and one that refus'd was adjudg'd to pay it: And it is to be observ'd, that besides the Admiral there were *Custodes maris* in every maritime County, who were chosen by the Commonalty of the County, 24 *Ed. 1. Rot. 78. Dorf.* and these with the Sheriff and Inhabitants did make Orders for these things.

3. It appears by the Pleadings that these Sesses were for Land-service only, and not for Shipping: And all the Dispute was, whether the Sess was upon the same Land for which he found a Man and Horse; for his finding Arms for the Land-service could be no Excuse for his not contributing to the Shipping.

But it may be said that the very Words are *pro Custod' Maris*: To this I answer, That it appears by the Records, that the Custody of the maritime Part of the Land is called *Custod' maris*, Claus. 23 *Ed. 1. M. 4.*

4. The Plaintiff was a Clergyman; and the Clergy having denied to aid the King, as the Luty did this Year, the King thereupon had commanded all his

his Courts, That if a Clergyman was Plaintiff in any Action, *Quod nullum ei fiat remedium.*

And with Submission, if this Case be of any Authority, it makes for us, even admitting that the Sesses were for Shipping; for the Abbot says, he had before found Arms for the Land Service, and demands the Judgment of the Court if he ought to pay this Sess too: The Defendants say that the Sesses were for other Lands, so that it seems to be admitted that none were chargeable for the same Land for Arms at Land and Shipping too.

But for the clearing of this and all other Cases concerning mere Right, I shall shew, that before 29 Ed. 1. both the King's Prerogative and the Peoples Rights were very uncertain; for tho' *Magna Charta* had been confirm'd eight or nine times, it was ordinary for the Judges to go directly contrary to it; as where *Magna Charta* says, for an entire Barony a Baron shall pay but a hundred Marks for his Relief, he was nevertheless compell'd frequently to pay a hundred Pounds.

Altho' by *Charta de Foresta*, cap. 10. it is granted, *nullus de cetero amittat vitam vel membrum pro venatione nostra*, yet Adam de Gower was beheaded for hunting in the Forest of Danby; therefore the Proceedings of the Courts of Justice in those times, in Matters between the Crown and the Subject, are not so much to be relied on as the Words of the Law.

It may be further objected, that before the Statute of *Winchester* the Subject was compellable to find Arms for the Defence of the Kingdom, and by the same Reason he might be charged for the Defence of the Sea.

Now admitting, (but not granting) the King might compel the Subject to find Arms, there is not the same Reason he might compel them to find Ships; for first, by Tonnage and Poundage, and other Duties at common Law, he hath a Supply for Shipping, but has nothing in particular for other Arms; and if the Subject shall be charg'd as above, and is liable to a Charge in kind too, then is the Charge double; whereas, as to Arms, it is but single.

Again, the Charge of Arms is but *mutatio speciei*, changing Money into Arms, for they remain the Subjects still in Property; but in this Way of Shipping, in respect of Victuals and Mariners Wages, the Money is sunk.

Further, That of Arms was not only for Defence against Foreigners, but for watching and warding, and keeping Peace within the Realm, and for the Assistance of the Sheriff when he shall have Occasion to use the *Posse Comitatus*.

Lastly, As to the finding of Victuals and Mariners Wages for twenty-six Weeks, this cannot be compar'd to that of Arms, but is rather like taxing the County for finding Soldiers to go out of their Counties.

The King alone
may lay an Im-
bargo upon
Shipping.

As to that Objection that the King may lay an Imbargo upon Shipping, and put a Stop to all foreign Trade; and if he may anticipate the Subjects Gain, by the same Reason he may take something away.

I answer, the Law only intrusts the King with the doing of that, which when done, must be most to his own Prejudice, in respect of the Customs and other Duties. And besides, this cannot be done but in time of War and imminent Danger, and therefore the Objection is not yet seasonable.

As to the last Objection, that by divers old Charters the Patentees are freed *de Danegeldo & Navigio*; which implies a Right: I answer, It may as well be infer'd the Subject is bound to repair the King's Parks, Houses, &c. these Charters freeing them also *ab operationibus omnium Regalium, Parcorum, Pontium*, and divers other things the Subject is not bound unto.

For the Precedents that are brought to support this Charge; I answer, As to those which were for the Charging of Sea-towns and Havens, they had many great Privileges upon that Account: They had the Benefit of Fishing, they were discharg'd of Arrays and Defence at Land, &c. but that those which were not maritime Towns should be charg'd, (which is the Defendant's Case) does not follow.

The Town of Bodmin in Cornwall, Claus. 13 Ed. 3, M. 14. par. 2. was discharg'd of Ships, because in

dista

dicta Villa portus non est, & longe a Mari distat, and hath not us'd heretofore to find Shipping; and on the Inquisition awarded to enquire of the Truth of it, it appears that inland Counties had not so much as *de facto* been usually charg'd with Ships: And as to the other Precedents, they were Cases that happen'd in time of War, and when the Courts of Justice were shut up; and besides, the Charge laid upon the County was by By-law and Agreement. See the *Scotish Roll*, 10 *Ed.* 3. *M.* 3.

Lastly, These Precedents, wherein the Subjects Rights were violated, procur'd the Statute of the 14 *Ed.* 3. against any Charge upon the Subject without Assent in Parliament.

I now come to the Proofs in Point. The first Authority I shall offer is the Patent Roll, 26 *Ed.* 1. *M.* 2. There is the Confession of that King and his Council, that he was so far from having a Power to tax the People for the Guard of the Sea, as that he is bound to make Satisfaction to the People for whatever had been taken from them for that End; and the Charges laid upon the People for the Guard of the Sea, were the principal Grievances that occasion'd the Statute of the 25 *Ed.* 1. and the Statute *de Tallagio non concedendo*.

The next Authority I shall produce is *Hill.* 23 *Ed.* 1. *Rot.* 77. The King having commanded thirty Gallies to be made by several great Towns, man'd with sixscore Men each, *pro defensione Regni & securitate Maris*; there appears to be many Cases in the Exchequer where the Money for making these Gallies was recover'd against the King, as well in his own time, as in the times of *Ed.* 2. & *Ed.* 3. See also the Parliament Rolls, 13 *Ed.* 3. *part* 1. *M.* 9. & 11. 22 *Ed.* 3. *M.* 21. 21 *Ed.* 3. *part* 2. *M.* 9. & 11. 2 *Ri.* 2. *part* 2. *M.* 5.

See also the 2 *Hen.* 4. *M.* 22. Commissions to charge the People to make Ships for the Defence of the Realm, repeal'd by the King and Parliament for that very Cause, because they were issued without Consent in Parliament.

4 *Hen.* 4. *M.* 28. The Lords and Commons grant the King a Subsidy, protesting that it should not be drawn into Example, to charge them in time to

come with Supplies for the War, or Safeguard of the Sea, without their full Consent first had in Parliament: And here is not only a Protestation of the whole Realm, but the King's Consent is also manifested, by his accepting what was granted, without any Qualification of the Protest.

The Service of
the Cinque Ports
ascertain'd.

My Lords, give me leave to observe further, 1. That the Service of the Cinque-Ports is certain in respect of the time, but fifteen Days in the Year; and in respect of the Charge, but twenty Men and a Master, and the Number of the Ships certain: Now if they who had such Privileges should serve but fifteen Days in a Year, how shall those who have no Privilege at all be made to serve twenty-six Weeks, as in the Writ?

2. Their Charge is certain both as to Number of Men and Ships, and that the rest of the Commons, who have no Privilege or Recompence for it, but on the contrary contribute to the Charge of the Cinque-Ports, should be liable to an uncertain Charge, is strange; and I submit it, whether by the same Reason the Ports are not bound to any further Charge after they have perform'd their stated Service, the rest of the Commons, who are not bound at all, are chargeable at all.

I shall not press the Disuse of these things any further than as an Interpretation of the Statute made against all Aids and Talliages in general; I know *nullum tempus occurrit Regi*: But I beg leave to offer the Non-claims of so many Kings and Queens, as a Manifestation of their general Consents that they would not lay the like Sess upon any of their Subjects, that is now laid upon my Client, without Assent in Parliament.

The first Day's Argument of Sir Edward Littleton Knt. Solicitor-General, in behalf of the King, in the Case of Ship-money.

Mr. Solicitor's
Argument for
the King.

The Danger
confess'd by the
Commons.

The Writ dated 4 Aug. 11 Car. directed into Bucks and other Counties, for raising Aids of Ships for the Defence of the Kingdom, is the Ground of this Assessment, and the Reason set forth is, *Quia Salus Regni periclitabatur*; which is not only confess'd by

by the Demurrer, but testified by the King under the Great Seal in the *Mittimus*; and in all Matters, especially concerning the publick Safety, the King is *Recordum superlativum & praeexcellens*, as in the Case of the Earls of Gloucester and Hereford, 20 Ed. 1.

The sole Question therefore is, Whether the King, finding the Safety of the Kingdom necessarily required the Aid commanded by the Writ, might not command such Aid for the Preservation of Kingdom and People?

We are agreed that the Kingdom is to be defended, and according to that equitable Rule in the Writ, *Quod omnes tangit per omnes debet supportari*; and we are agreed also that the King is intrusted with this Defence; but it is deny'd that he may do it out of Parliament; I should be sorry to hear there could be no Salvation for the People but in Parliament.

There has been a pretty Survey taken of the King's Revenues, very little to the purpose, and in which are many Mistakes; but he has agreed Cases much more prejudicial than the Case in question; he has admitted the King may do it if there be an actual War, or a War denounc'd, tho' never a Blow be struck; and can't it be done when *Salus Regni periclitabatur*?

The fundamental Reason is that exact Rule of Law in the 10th Report, cited by Mr. St. John, viz. *Salus populi suprema lex*; and it would be strange if the King could by his Writ give us a Remedy for *White-acre* and *Black-acre*, and not be able to grant a Writ to defend the Kingdom when it is in imminent Danger.

The Commonwealth is to be prefer'd to all private Estates: If an Enemy approaches, a Man may erect Forts on another's Soil for the Defence of the Kingdom, *Dyer* 36. and shall not the King keep the Out-works at Sea to prevent the Enemy landing at our Doors? By the King's Command Suburbs may be raz'd: And in 88, when there were three great Armies rais'd, consisting of 100,000 Men, Horse and Foot, Orders were given, if they could not prevent the Enemy landing, they should burn the Houses, and destroy every thing that might afford them any Shelter or Subsistence: Where was the

Law

Private Right
must yield to the
publick Necessi-
ty.

Law of Property, in this Case, so much talk'd of? It is impossible to save private Fortunes if the publick be lost.

And the King has many Prerogatives over the Estates of private Persons: He may enter a Man's House, at least his Out-house, and dig for Salt-petre, because it is for the Defence, 11 Rep. fol. 81. Bowles's Case; and he may enter the Subjects Lands and dig royal Mines.

Fishermen may justify going into others Lands to fish, because it is *pro bono publico*, 8 Ed. 4. 18. Dyer 36.

A Man may pull down another Man's House when the next is on Fire, &c. Necessity is the Law of the Time and Action, and things may be lawful by Necessity, which otherwise would not. Goods may be thrown over-board at Sea for the Safety of the rest, or of the Mariners Lives; and what, do we talk of Formalities, when the Kingdom is like to be lost, when the keeping of the Laws would end the Commonwealth?

I shall next shew that the King has trod in the Steps of his Ancestors; I shall shew divers Exemptions a *custodia maritima*; and first, that of King's College in Cambridge, 21 Hen. 6. Matth. Paris 838. mentions Privileges granted to the Archbishop of Canterbury, London, &c. they were bound to do nothing but pray, and yet were not exempted from publick Defence.

The Kingdom of England consists of Land and Sea; I hope we shall not stand at half Defence, defend the Land, and leave the Sea: The King after War denounc'd might seize the Lands of Priors Aliens, 48 Ed. 3. 10. and might he take the Possessions of Aliens, and not compel his natural Subjects to defend the Land and Sea? The King may lay a Charge upon the Subject for walling of a Town, because they have Benefit by it in Time of Danger, and is not the whole Kingdom preserv'd by a Navy at Sea? And this is agreeable to all Laws, that where they have a Benefit they must contribute to the Charge, 10 Rep. fol. 141. And for lesser Matters, Pontage and Paveage, the King may impose a Charge, and distrain the Ter-tenants to make Contribution *secundum statum & facultates*.
The

The King may charge a Town for building their Walls,

The King may compel a Man to be knighted, because it is for Defence ; nor are the Judges or Clergy exempted from serving in Cases of Necessity.

In case of imminent Danger, ordinary Proceedings are dispenc'd with, *inter arma silent leges* ; nay, if there be but Rumors of Wars, the Laws are silent. In 14 Ed. 2. B. R. Rot. 60. the Scots besieg'd Durham, and would have a Sum of Money before they would depart ; and in this Peril the People met together, and swore that whatever should be agreed of among themselves every Man would stand to ; and it was order'd that the Houses should be search'd, and what Money was found should be taken for that purpose, and from one Man 60*l.* was taken ; and he afterwards brought his Action, and at Durham it was adjudged for him ; but upon a Writ of Error in the King's Bench that Judgment was revers'd ; and in Queen Elizabeth's Reign greater things were done upon less Occasions. And Ships have been taken, the Ports shut up, &c. upon an Apprehension of Danger ; the Law considers what may happen, and if there be but *vulgaris opinio*, it is enough, much more when the King in his Judgment foresees it.

Again, the making War and Peace is a *Droit Royal*, the Subject has nothing to do with it : If the Subjects of this Kingdom fight with another Nation without the King's Authority, it is no War : Sometimes Dangers are fit to be communicated to the People, sometimes not ; the King best knows the Exigency of Affairs, and is it fit the Kingdom should be found without a Navy, when there are such military Preparations in the neighbouring Kingdoms ? Dangers are as well to be prevented as remov'd.

Danegelt, before the Conquest, was paid annually ; but afterwards, whenever there was *Bellum*, or *opiniones bellorum*.

Before the Conquest King Edgar had his King-Lents, who swore to co-operate with him *per terram & per mare*. King *Ethelred* commanded that every 310 Hides of Land should find a Ship, and those who had less should find other Arms at their

Ethelred commands every 310 Hides of Land to find a Ship.

own

own Charge, for every Ship eight Oars, *ut tempore Patris*, that was, *Canutus*.

In the Laws of the Confessor, by Mr. Lambert, and the *Black Book* in the *Exchequer*, it was sometimes one, sometimes two Shillings annually, *in usus maritim*; And to say that this was by Statute, because of the Word *Statutum*, [*de regibus Angliæ statutum*] is trifling; for in those times *Statutum*, as in *Cicero*, was a *Constitution*; there were no Parliaments then. *Danegelt* is said to be released by the Confessor, because he saw the Devil dancing upon the *Danegelt*; but the *Black Book* says it was paid in the Conqueror's time, and it was paid in *Henry 2d's* time, 4 *Hen. 2. Pipe Roll*; and tho' the Name was alter'd, the Thing continued.

In the Conqueror's time divers Towns and Shires were charg'd; and gave Assistance both by Sea and Land, *Black Book, fol. 56*. In King *John's* time they gave a fourth Part of their Revenues for Defence. The 48 *Ed. 3. Claus. M. dorf.* some Captains and others were not able to maintain themselves, and the King commands they should be paid *de Com' Comitatus*, 48 *Ed. 3. M. 2. de pecunia levand' circa tuitionem maris*.

The Citizens of London and Men of *Greenwich* are commanded to guard the Mouth of the *Thames*, and *Greenwich* plead they were distrain'd upon common Summons for their Service in *Kent*; and the King commands they should be freed in *Kent*, and join in Defence of the *Thames*, *Claus. 48 Hen. 3. M. 11. dorf.* and when any refused to attend the Defence, the King commanded to seize their Lands, and take the Profits, and answer them into the *Exchequer*. The finding of Arms began not by the Statute of *Winchester*, but it was then appointed after what manner they should be rated: A Power was given to compel Men to make Defence *juxta facultates*; and the County of *Berks*, tho' an inland County, upon Refusal, a *Capias in manus* was awarded to answer it in the *Exchequer*, 24 *Ed. 1.* The Terms *Custodia maris & custodia maritima* are Terms convertible: And in the Case of the Abbot of *Robertsbridge*, he does not deny the Authority of the Writ, but pleads he found a Horse *ad custodiam prædictam*,

dictam. [Here Mr. Solicitor cites a multitude of Authorities, especially in the Reign of *Ed. 3.* where the Subject was commanded to provide for the Defence of the Sea as well as the Land.] It is apparent from these Records that the Sea and Land have been guarded by the Commons when the King apprehended any Danger; and if the Danger was great, no Age, or Sex, or Order were exempted; and those who refused were compelled by Imprisonment, or Seizure of their Lands and Goods, and the Writs have significantly express'd that no Wages ought to be paid by the King. [Then he proceeds to cite several Commissions for Defence in the time of the Civil Wars between the Houses of York and Lancaster, and amongst the rest a Commission of Array by *Ed. 4.* to raise a Power against his great Adversary and Rebel *Henry VI.* who lately enjoy'd the Crown by Usurpation.] *Stat. 1 Hen. 7. cap. 16.* Every Subject is bound by his Allegiance to assist when Need requires. *Stat. 35 H. 8. cap. 13.* Remission of Loans reciting *est duty & honor del people*, to assist their Kings in Body, Lands and Substance in his Wars, and there it was only for offensive Wars.

4 & 5 of *Phil. & Mar.* Commissions of Array to go to all Gentlemen, but now but one Lieutenant of a County, whose Power is the same in Substance as the Gentlemen had by the ancient Commissions of Array. 3 & 4 *Phil. & Mar. 1557.* *Calais* was besieg'd, and there issued a Command to the Warden of the *Cinque Ports*, 5 Jan. to make Proclamation in *Kent*, that all from sixteen to sixty should repair to *Dover* to save *Calais*, on Pain of Death. In the Reign of Queen *Eliz.* a Commission issued to muster all Men against *Scotland*; and with these Commissions went Instructions, importing that they should consider how necessary the Service was, because of our Subjects long Continuance in Peace, and our Neighbours being in Arms about our Realm; and if these Times be not worse, I shall submit.

In 1588, when that great Armada came, the whole Kingdom was in Arms at the Subjects Charge. 31 *Eliz. 14.* the Subjects grant a Subsidy in Consideration of the Queen's Charge, tho' the Subjects were then at great Charges both for Land and Sea, by

Ancient Commissions of Array.

The Subjects serv'd at their own Charge in the Year of the Spanish Invasion in 88.

The Charge of
the Forces
rais'd against
the Earl of
Essex borne by
the Subject.

by Virtue of a Power from her Council-Table. The City of *London* being desir'd to find ten Ships, offer to find twenty; such was the Affection of those Times, they did not dispute, but obey'd. 28 April 1558. A Letter to Sir Robert Wingfield, that the richer Inhabitants of certain Towns in *Suffolk* should set out a Ship, since the poor could not. *York* commanded to contribute to a Ship charg'd on *Hull*. A Letter to other Towns to contribute to *Colchester*; who refusing, were compel'd to do it. Preparations were made against the *Spaniards* in 87, they did not stay till 88, till the Tops of the Ships were seen. In 1599 great Forces were assembled in *London* for Defence of the Queen against the Earl of *Essex*; and the Charge being common, the Charge was borne in common, even the Inns of Court were charg'd: A Letter went to the Benchers of the Inns of Court for that purpose, and all the Gentlemen found Arms; and where she would not have their Persons, she had their Purfes. In King *James's* time there was no occasion for these Charges, his Motto was *Beati pacifici*. The 2 Car. (the present Reign) a Proclamation issued, that all should repair to such and such Places, and remain there while the Danger was over; and for a binding Authority there is the Resolution of the Judges under their Hands the 12 Car. which was inroll'd in every Court at *Westminster*; and this one would have thought should have given Satisfaction; it would in former Times, nor is this a new thing: The Judges have often been assembled in the Star-chamber, and Questions propos'd to them, and the King has reason'd with them, 2 R. 3. fol. 10. 8 H. 8. 190. But his Majesty has been pleas'd further to give way, to have the Matter publicly debated in a judicial way; and he hopes few oppose the thing out of any Averse-ness to the Service, but to satisfy themselves and submit.

That learned Gentleman, Mr. St. John, hath taken great Pains, and I am glad to see such Searches made in a Business of this Nature: It is for the Honour of the King, and the King hath commanded with his own Mouth that free Access should be to the Records in this Business, and I have di-
rected

rected the Officers to shew the other Side whatever I had.

But the Records they have cited, take them at the best, are not of such Weight, in Point of Right, as the other produc'd for the King; for if a King shall voluntarily, or in Ease of his Subjects, remit any thing, this is not of that Weight as the shewing the constant Use of that compulsive Power us'd by the Crown, and obey'd by the People: If any King has spoken in gentle Words, as King John when he was depos'd, this will not be of that Force as the Words us'd in the Writs.

It was said that the King has *voluntas interna & externa*, a private Will and a legal Will, and that the King cannot sit in Judgment himself, which is founded on the Book Case 2 R. 2. fol. 10. 11. But that the King cannot sit in Judgment I deny. Can that be wanting in the Fountain that issues in the Stream? Is it not said *coram Rege* in the King's Bench? And did not Edward IV. sit in Person there in a Trial of Rape? And the famous Justice Popham sat at the King's Feet, and other Judges on each Side, and were therefore call'd *Justiciarii a latere Regis*. And did not King James judge those two Cases of *Beltingham's* and *Sir Thomas Lake's*? The Book cited by them doth not say the King shall not judge, but that if one be convicted before the Judges, the King shall not set the Fine, because he did not hear the Cause; which is not to the purpose.

Whether the King may sit in Judgment himself.

up to the law
of the King
and the
people

on the
King's
side

It was said, No Law can be chang'd but by Act of Parliament, as Legitimation, Naturalization, &c. and that this Writ for Shipping made a Change in Law; but it is so far from being a Change of the Law, that it will be found to have been the Custom of all Ages: And tho' it be said that the King appears in the highest Power and Magnificence in Parliament, yet he is King of England out of Parliament; and because he may do a thing in Parliament, it doth not follow that he may do it no where else.

But it is said the King has Provision for War. This was affirm'd in order to take a Survey of the King's Revenue, and wheedle the People: He begins with the Tenures by Knights-service, and of such Towns as are most expos'd; Dover, Durham,

Only Horse
could be rais'd
by that Tenure
of Knights-ser-
vice.

†
Chester,

Chester, &c. and concludes, that because the Kings of *England* were so careful to have a Number of Horsemen train'd up; to be ready upon all Occasions, therefore he shall have no other Aid when the Kingdom is in Danger; Must we therefore have no Foot, no Guard for the Sea? Besides, by this Tenure they were to serve but forty Days, and it was instituted chiefly to restrain any sudden Incurfion from *Scotland* or *Wales*; and as to *Escuage* being assess'd by Parliament, it was not so till it was alter'd by 17 *Johannis*, Stat. de *Rumney Mead*; and the true Reason of assessing it in Parliament was, because other Men had *Escuage* as well as the King, and the Lords us'd to take too much.

Knights-service
was reserv'd on-
ly out of the
King's Lands.

Will. I. no
Conqueror.

He says the King is in Possession of Wards, Reliefs, &c. and that they were design'd as a Maintenance for the Wars; but he can shew no good Authority for this Assertion, unless he will say, because the King reserv'd some Tenures out of his own Lands, he shall have nothing of the Subject: The King could not give other Mens Lands for those Tenures; and it is apparent the *Normans* came not in by Conquest; for after the King came in, Men recover'd the Lands that were their Ancestors: And what do the Soakmen and Plowmen pay by their Tenures towards defending them? therefore these are rather sly Insinuations than Arguments.

He cited also two or three Tenures in relation to the Sea; one to hold the King as Head at Sea, and such like; as if the Sea were to be defended by these: And as to the Service of the *Cinque Ports*, is that a competent Provision for the Defence of the Kingdom? and is it not reasonable the whole Body should be concern'd in its Defence? That of the *Cinque Ports* was but for the Defence of the Merchants from Pirates, and not to be relied on *quando Salus Regni periclitabatur*.

He mentions also the King's Pretogative in royal Mines, to enable him to defend the Kingdom, and shews that the People petition'd that the King would live on his own Revenue; and this might appear reasonable at that time, but must it therefore now?

As to the old Customs and lesser Customs, the Inheritance of the Crown; he says these were for the Defence of the Sea, but he was the first that ever said it.

As for Tonnage and Poundage, this indeed might be intended for the Security of Commerce, to guard the Seas from Pirates and Robbers in times of Peace; and Rot. Franc. 2 R. 2. 7 Hen. 4. M. 23. Rot. II. Tonnage and Poundage were actually granted to the Merchants to guard the Seas, and preserve their Intercourse; and 6 R. 2. M. 8. Franc. Rol. part 2. Merchants and Mariners had *custodia maris*, and the King granted them 6 d. per Pound: And here it is stipulated in the very Grant, that they should not be oblig'd to assist upon any foreign Invasion, unless a royal Power came; therefore this was never intended for any extraordinary Service; and Impositions, and Prizage of Wines were for the Supply of the King's House, and not for the Guard of the Sea.

Then they tell us that these Writs might be by Authority; but it appears that the Writs for Shipping were frequently granted before the Parliament sat: And to say that because the King has done a thing voluntarily, therefore he is under a Necessity of doing it, is a weak Argument. Henry VII. did indeed bring things into Parliament to serve his own Ends; but did Queen Eliz. send any of her Commands out of Parliament? and yet her Subjects gave her Subsidies.

It is objected that *Fortescue*, Ch. Justice of the King's Bench, held that nothing could be taken from the Subject but in Parliament; that is *ordinarily*; but does he say, he shall not contribute to defend himself in imminent Danger? 'Tis said, it does not appear that the Service of the *Cinque Ports*, and Tonnage and Poundage are yet spent, & *Lex non facit saltum*: But this should have been pleaded if they would have taken Advantage by it.

But it was further urg'd, Admitting they had been expended, the Property of the Subjects Goods could not be alter'd but in Parliament: Yet he agrees the Kingdom must be defended, and that this did not belong to the People; so that the King

is to direct the War, but can command neither Men or Money without the Subjects Leave.

And to fortify his Argument, he says, the King frequently borrow'd Money for the Wars and promis'd Repayment, and that without a *Salvo* of his Right ; but does any Man think that if the King borrow 10000*l.* of a particular Man, it ought not to be repaid ? But that the King cannot command the Aid of his Subjects, because he borrows of his Subjects upon any ordinary or extraordinary Occasion, is no good Argument.

And whereas it is said the Law delights in Certainty, and this Assessment might as well have been 20 Pounds as 20 Shillings : Indeed, he must be a wise Man that can tell what a Defence will require, and the Expence must be proportionable to the Defence : But the Writ takes care that the Sess shall be equal, and if the Sess be too high, he may call the Sheriff to account ; but I believe the Sheriff ought rather to be fin'd for sessing him too little ; possibly twenty Pounds would have been more proportionable to his Estate.

We are told also, that our Kings have maintain'd Armies themselves : And this may be ; but we shew that in all Ages, when the King commanded his People to attend him, or his Lieutenant, they obey'd, and his paying other Armies, perhaps for foreign Wars, infers nothing to the contrary.

But 26 *Edw. I. Reginald de Grey* dare not levy Men without Pay ; this was for the Wars in *Scotland*, the King was then actually there : And *Trin'*, 31 *Edw. I.* there is a Refusal to march without Pay ; that is, the East-Marches of *Scotland* refus'd to march to the West, unless they had Money to keep their own Borders in their Absence. I admit some have been discharg'd from the Custody of the Sea, because they were *prompti* at Home, some were discharg'd because of their stay at Home to guard the Coasts ; but this proves the Right of the personal Service, and of the Contribution too.

It was objected, that by the Statute of *William I.* the People were to enjoy their Lands *sine omni injusta exactione sive tallagio* : But it is one thing to charge a particular Person, and another thing to set

set an equal Rate upon the whole Kingdom, according to ancient Custom.

As for the Loans requir'd in the present Reign, they were upon other Accounts, and not for Defence; and the King says at their Desire the Commission should be cancel'd, but there is no Determination of Right.

I now come to Mr. *St. John's* great Objection, that the requiring this Aid is against the Statute of 25 *Edw. I. de tallagio non concedendo*.

As to this I answer, that in some Statute Books this is not mention'd; in others the King's Reign is wanting; and in others the Year; and now they would have it to be the 25th of *Edw. I.* because of the compelling Aid 23 and 24 *Edw. I.* which they say was the 25th complain'd of and redress'd; and they rely upon the Authority of *Walsingham*, a Monk of *St. Albans*, who wrote about 140 Years afterwards: I never knew an Historian that ever read the Records, or could be rely'd on in Matters of Law.

In order to state this Matter justly, three things are to be considered; 1. What kind of Aid was in use before 25 *Edw. I.* 2. What Remedy was given by that Statute: And, 3. How far that Statute is in Force.

For the first; it appears, that the *French King* had seiz'd *Gascoigne*, because the King of *England* did not appear at his Parliament of *Paris* on a Summons; the King enter'd into a War for regaining of his Dutchy, which continued with various Success till 25 *Edw. I.* He was also engaged in a War with *Scotland* and *Wales*: And for maintaining these Wars divers Aids and Supplies were taken, some by voluntary Grants of the People, some by Impositions and Levies, by the Names of Talliages and Taxes, and some by Assessment of Lands, as the Abbot of *Robertsbridge*. And besides these, Goods and Money were taken from the Possessors without any Rate or Tax; nay, the Monasteries were ransack'd, and the Money taken that was found there: And Mr. *St. John* rightly observ'd, that the Clergy upon their Denial were put out of the King's Protection, and ransom'd themselves by giving a fifth

Money seiz'd
in the Monasteries
by Force

Part of their Goods, *Pat. 25 Edw. I. M. 11. Pars 2.* The People, being so griev'd with such Aids and Prizes for the Maintenance of a foreign War too, obtain'd, that it might be enacted, that no such Aids in a relative Term should be taken without their Consent: *Confirm' Charta.*

These many Aids having been granted and taken for the Wars, though it was said to be but for a certain time, the People were apprehensive it might bind them for the future, as appears by *Confirm' Charta*; where it is said, "That for as much as divers of our Realm are in Fear that the Aid and Taxes, which they have given us before time, towards our War, and other Business, of their own Gifts and good Wills, might turn to a Bondage of them and their Heirs, and also for the Prizes taken; We do grant, for Us and our Heirs, that We shall draw no such Aids or Prizes into a Custom; nor shall they be taken but by common Consent; saving the antient Aids and Prizes due and accustom'd." This kind of Aid could never be meant when *Salus populi periclitabatur*. This may be levy'd notwithstanding that Statute, for the Act is only against such kind of Aids as had been granted voluntarily by the People; that these should not be taken against their Wills hereafter, but by Consent in Parliament.

And, 2^{dly}. This refers to those Aids that were granted for the Wars of Scotland and Wales. And further, all antient Aids were excepted; and this was an antient Aid: And the Practice shews, that this was levy'd in several succeeding Reigns, which best interprets the Words of that Law.

As to what they call the Statute *de Tallagio non concedendo*, it is no more than an Abstract of *Confirm' Charta*; there is nothing in it but is express'd at large in this. The Pardon of the Lords, 5 Nov. 25 Edw. I. is seal'd by the King, and upon the very same Roll with *Confirm' Charta*; so that the Monk mistook this Statute is plain. And it was this *Confirm' Chart'* that was sent over to Flanders and seal'd by the King: I have the very Copy of the Statute-Roll here. Nor can they ever shew, that this Statute *de Tallagio non concedendo* was entred on

on the Roll; and indeed it is absurd to imagine that an Abstract of an Act should be entred on the Roll; nor was it ever produc'd to discharge a Man from contributing to the Defence of the Kingdom before. And though it be farther objected, that the King says in his Proclamation he was sorry he had demanded those Aids of his People; it should be remembred those Aids were not only for Defence, but for his foreign Wars.

As to what has been urg'd concerning the Transactions in 2 Rich. II. it is plain the Supply was for the Wars in *France, Scotland and Ireland*, and not purely for the Defence of the Kingdom, though that be one of the Inducements ment'on'd; for the Commons, say they, ought not to bear such foreign Charges: The King tells them, that by defending *Gasconne*, they defended *England*; it was a Bulwark to *England*. It is to be considerd further who it was that said they could not charge the Commons out of Parliament, it was the Lords, and this was in the Reign of Rich. II. who was then a young Prince, and the Parliament observing his tender Years, assum'd a Power to themselves they had no Pretensions to: They would not admit any of the Council for governing the Kingdom to be remov'd but by their Consent; they must be chosen in Parliament, and the King's Treasurer must be govern'd by the Parliament.

The next thing, they say, considerable is, that it must be a time of War, the Courts of Justice shut up, or at least a War proclaim'd to justify these Levies: But still this puts the thing in the King's Power; and tho' antiently Wars were solemnly denounc'd before they were enter'd into, this is not always the Practice at present; they begin with the Sword frequently, not by Trumpet or Herald.

And though it is said, if the King be in the Field, and the Courts of Justice shut up, that is to be interpreted a time of War; yet it is plain, in all our Civil Wars the Courts of Justice sate, from the Causes that were then determin'd; there may be great Wars in the North towards *Scotland* and elsewhere, and yet the Courts may sit at *Westminster*;

What shall be deem'd a time of War.

but whenever War is made against the King, that is *tempus belli*; and who shall be Judge when Danger approaches? shall not the King?

Pontage and Murage, they say, only charge those things that are *Venalia*; Men are not compelled to go to Market; but how shall they live then? Indeed, they are not compelled to go thither, but 'tis compulsory to pay the Money.

And 'tis said between the *Teste* and Return of the Writ are seven Months, and in that time a Parliament might have been summon'd.

But notwithstanding a Parliament may meet in forty Days, there are so many things to be settled: A Speaker is to be chosen; Disputes between the two Houses, Conferences, &c. that in the mean time the Kingdom may be lost: But suppose the Supplies granted, there is a great deal of time spent afterwards, in Assessments, Collections, &c. and time must be allow'd for the Ships to sail from the North to Portsmouth; and these things rest solely in the King's Judgment.

They cite the 31st of Hen. VIII. cap. 8. That none shall be depriv'd of their Lands or Inheritance; but here are no Lands or Inheritance taken away; let them but contribute to their Defence, and all is well; Mr. Hambden has had none of his Goods touch'd.

Mr. Holborne's Argument on Behalf of Mr. Hambden.

Mr. Holborne's
Argument for
Mr. Hambden.

My Lords, I shall first enquire, Whether upon the fourth of August, the Day of the Date of the Writ, the King could charge the County of Bucks, to find a Ship at their own Charge: 2. Admitting he could, whether the King could give Power to the Sheriff to assess the County. 3. Admitting the King have Power to charge and assess, Whether he can levy the Money unpaid by this Course of *Certiorari* & *Mittimus*, as if it were his proper Debt.

As to the first; The Question has been stated on His Majesty's Part, thus; (*viz.*) Whether the King in his Judgment, finding the Preservation of the Kingdom necessarily

necessarily to require this Aid, might not command such an Aid by the Writ for saving both Kingdom and People?

As to this Question thus stated, I have these Exceptions; first, it does not appear by the Writ, 4 Aug. That in the King's Judgment the Kingdom was in Danger to be lost; or if it do, that the Danger was so instant and unavoidable that it necessarily requir'd this Aid, and by this Writ; and that the Occasion could not expect a Parliamentary Consideration: And lastly, whether for the Truth of this the King's Certificate was sufficient in a legal way.

In the Writ, 'tis true, there is mention of a Loss by Merchants, and this Loss occasion'd by *Prædones, Pirati, & Maris Grassatores, tam Nominis Christiani hostes Mahumetani, quam alii*; but here is no Danger mention'd from any other Kingdom; or of Danger to the People in general, but to the Merchants, and this only in Point of Molestation, nothing as to their Safety.

But be it to the Kingdom, or to the Merchants, in Point of Trouble or Safety, here is no mention of such instant Danger as to require this Command in the Writ, even in the King's Judgment; for from these Premises nothing material could be presum'd to happen towards endangering the Kingdom, and the Conclusion will be but this, *convenerit accelerare*, it is fitting to hasten; and this must be taken in relation to the Premises on which it is built: And though it be *cum omni festinatione*, that is such haste as by Law you can make. And it appears by the Record there was no such instant Necessity but a Parliament might have been call'd, for there were above 200 Days between the *Teste* of the Writ, and the Rendezvous appointed; the Parliament require but forty Days, and in the remaining time the Parliament might have considered of the Defence. And though Mr. *Solicitor* has cunningly lengthen'd out the time, and things are often long deliberating upon, yet they may be sooner where Necessity requires.

But I conceive the only Doubt is occasion'd by the *Mittimus*, which recites the Writ of the first of August, and then adds, *Quia Salus Regni periclitabatur*;

mur; and this 'tis said we have confess'd by the Demurrer: And if that should not hold, it is said that the King, who is sole Judge of the Danger, hath certified it under his Great Seal. To this I answer, That the Words *Salus Regni periclitabatur* are but relative, and refer to the Dangers mention'd in the Writ of the 4th of *August*, for they come in on the Return of the Writ; and since we have the Writ it self, the Comment, or further Explanation thereof is not material; and further, the particular Causes being assign'd in the first Writ, whether any further Causes can legally be added in this, tending to the same End, I question; and if not, then our Demurrer will be no Confession of any such Danger.

But had the Words been positive, the Word *Salus* is but metaphorical, and the Law will not endure Metaphors in Writs and Pleadings: We know not how to take Issue upon it, nor do these Words import immediate Danger of the Loss of the Kingdom; for apply the Words to a natural Body, *Salus J. S.* is in danger, does that necessarily imply he is in such instant Danger of Death? The Doctor may say his Patient is not in health, and yet he may be in no Danger of Death. The same Sense it must have as to the Body Politick; tho' the Words may imply Danger, yet not such a Danger as may hazard the immediate Loss of the Kingdom. Indeed things may be in Agitation, that may occasion the Loss of the Kingdom twenty Years hence, but the Words will never come up to the Sense they would put upon them.

Whether a Fact shall be determin'd by the King's Certificate.

It is added that the King has declared his Opinion under the Great Seal, and this is conclusive. My Lords, I profess for my self and my Client we make no doubt of the King's Word; we believe there was a Danger, tho' not so apparent to us: But we urge it how far in Form of Law this is to be allow'd. And I take leave with your Lordships Favour to say that in legal Proceedings his Majesty's Opinion and Certificate in things of Fact is not binding; and as to that Case, 20 *Ed. 1.* concerning the Lords, that the King was *Recordum superlativum*; this is but an Allegation of the King's Council.

But

But what I principally rely upon is, that tho' it doth now appear by the *Mittimus* that the 4th of *August* the Kingdom was in Danger of being lost, yet that is not sufficient in Law; nor can our Demurrer hurt us, because this did not appear in the Writ of the 4th of *August* it self, for the Writ and Declaration in Law must ever contain sufficient Matter to warrant the Demand: How could the Subject know by the Writ of the 4th of *August* whether he ought to obey or no? he could not divine what Dangers would be declar'd afterwards.

A Commission sent out without Cause express'd is not good.

But lastly, Admitting the King had said the Kingdom was in such instant Danger of being lost, and that it could be prevented no other Way; yet if the contrary appears in the Record, then neither is the Demurrer, or Confession, or the King's Certificate conclusive.

Thus I have thrown out of the Case every Consideration, but that of protecting the Merchants against Pirates, and the ordinary Defence of the Sea; and I conceive I might here, without further Argument, venture my Client's Cause with your Lordships: But I shall proceed, and enquire whether by the fundamental Policy of *England* the King can charge the Subject out of Parliament for common Good, or for the necessary Defence, if in his Majesty's Judgment the Danger be instant and unavoidable.

I now come close to the main Argument, but possibly the Case may receive a Determination on the Penning of the Writ; and out of Duty to his Majesty I humbly offer it to your Lordships whether the arguing concerning the King's Power may not be a Disservice to the Crown. For my Part I have labour'd to decline the main Question, and would be glad it might sleep; and here I shall rest, or upon your Commands proceed.

Lord Ch. Justice *Finch*: We don't use to judge of Cases by Fractions,

Mr. *Holborne*: Since it is your Command, I shall go on; I hope his Majesty will excuse us for arguing what cannot else be determin'd, and if any
Mat.

Matter of State comes in my Way, I shall tread as lightly as I can.

1. I shall first shew negatively that the King cannot out of Parliament charge the Subject either for the Guard of the Sea against Pirates, or for the Defence of the Kingdom, tho' the King judge the Kingdom in Danger of being inevitably lost.

2. I shall make out positively that the King regularly is to be at the Charge of guarding the Sea against Pirates, and of the Defence of Land and Sea against Enemies as far as he is able; and that the King has a Provision for both, especially for the Sea-service.

But before I proceed further in the Argument, I profess for my self and my Client, that when we mention how far a Governor, subject to Error and Will, may use a regal Power, we acknowledge our present Happiness to be bless'd with so just a Prince, that were his Majesty immortal as he deserves, and were we sure his Successors would inherit his Virtues, we should wish the regal Power might be unlimited, and free from political Advice.

Lord Ch. Justice *Finch*: This belongs not to the Bar to talk of future Governments, you are not to bandy about the Hopes of succeeding Princes, when the King has Children that may succeed him in his Crowns and Virtues.

Mr. *Holborne*: My Lord, I look many Ages further, 500 Years hence.

My first Argument I shall draw from the Policy of *England* in the necessary Attendance in the particular Advice in Parliament: If the King can do this alone, what is become of the Policy, for which the political Advice was made attendant to the regal Power?

2. If the Subject hath a Property in his Goods, how is it in the Power of any one alone to charge them? If the King can without a Parliament charge the Subject in his Estate, on Pretence of common Good; then a Prince 500 Years hence, subject to Error, may, if he will, upon any, or no Occasion, charge the Subject as high as he pleases.

And

And as for the Distinction between Danger, ordinary and extraordinary, if the King be Judge of that Danger, then has he no Restraint but his own Will: It is true, the Law Books say the King can do no Wrong, and therefore the Law hath taken care that he should do none: For he cannot make a Diffessin or Discontinuance, he may have an Inclination to make an Entry; but the Law, because he should do no Wrong, hath made this Act void; which is not any Disability in the King, but a Prerogative to make him come nearer the Divinity of the Attribute.

This Nation has ever judg'd it dangerous, when they thought fit to lay any Restraint, to admit of an Exception, tho' there might seem Cause for it, lest the Party intended to be restrain'd should make himself Judge of the Exception, and so break thro' it. *Thomas of Becket* would not swear to the Laws of King *Henry II.* without adding *salvo Honore Dei*; but if that had been allow'd, then the King apprehended the Clergy would make themselves Judges what was to the Honour of God, which tho' he never intended to violate, yet possibly such a *Salvo* might in Time have destroy'd all Allegiance.

And in all Acts of Parliament where the King was intended to be restrain'd, if any Exception was admitted, they took care to put it in such Words as would admit of no Evasion: In the Stat. of 25 Ed. 1. against Aids, there was indeed a saving of the ancient Aids due and accustom'd; but the Subject was so unsatisfied with it, that to take away this Exception, the Statute *de tallagio non concedendo* was made. What an Effect such Exceptions have had, *Normandy* will shew us, (they had the same Privileges we claim, and much of their Law came in here with the Conqueror) They complain'd of being burden'd with Taxes: *Lewis XI.* acknowledges the Justice of their Complaint, and promises they should be tax'd no more, but upon great Occasions; and what follow'd their Histories declare.

There is no Government so perfect but a Case may happen for which no Provision is made, and where Men are in danger of two Evils, they take care to chuse the least; the Rule of Law is rather

a Mis-

Rather a Mis-
chief than an
Inconvenience.

Where there is
a real Danger,
the People will
not fail to con-
tribute.

And the Subject
as well as the
Prince may use
another's Pro-
perty in case of
imminent Dan-
ger.

a Mischief than an Inconvenience : Now by a Mis-
chief is intended such Things as fall out seldom or
never : An Inconvenience is something which may
ordinarily fall out : It is true, there might be a
Mischief for want of this Power in an extraordina-
ry Case, but it is a Mischief that may very seldom,
or perhaps never, happen ; but to allow such a
Power would be an Inconvenience daily.

And, my Lords, admit there was an Enemy ready
to land, and no Possibility of a Parliament ; why in
that Case there goes out a Writ, a *Mandamus Rogan-
tes* : But this is in *Articulis necessitatis*, and *quatenus*
a *Mandamus Rogantes*, not *Subpœna forisfacti* of all
you can forfeit ; but for your own Preservation, and
the Safety of the Kingdom. Such Writs as these
indeed have been issued when a Danger has been
near, and they have served the Turn, and indeed in
Cases of Necessity there needs no Law to compel ;
the same Instinct that made Men desire Government
for their Preservation, will induce them to contri-
bute to their Defence, when they are in Danger not
only of losing all that they have, but of their Lives
too. Property we acknowledge must yield to Necessi-
ty. In these Cases of actual Invasion and instant
Danger, it is not only in the Power of the King,
but of a Subject, to enter upon another's Property ;
he may make Bulwarks, or do any Act upon any
Man's Land, and invade any Man's Property towards
Defence. And, he may prejudice the King himself
in Point of Property. He may take the King's
Horses, blow up a City, &c. to prevent their fall-
ing into the Hand of the Enemy ; but *levis timor*
will not justify such Actions, there must be an actu-
al and apparent Danger.

I shall proceed to shew that the Law doth not
leave it in the Power of the King to lay any Charge
upon the Subject, but in such Cases where it has
made Provision, that if he would he cannot miscar-
ry : And because it is held as a Maxim that the
King can do no Wrong, and that therefore the Law
reposes this Trust in him of charging without Dan-
ger, I shall shew where the Law does take notice
that the King may do amiss.

It is true, the Law does allow the King to com-
mand Payment of Monies in some Cases, but it is
where

where the *Quantum*, or Occasion, is subject to a Tryal: The King has a double Capacity, as he is King, and as a Man; and to say, as a Man he cannot err, is strange: Humane Nature has no such Prerogative, they have natural Infirmities, and must die, and so is it as to their Understanding and Will; and the Law must take notice of possible Mistakes in Government; nor is this Possibility any Injury to a good Prince, but sets off his Merit with the greater Lustre: And lest possible Infirmities of the natural Body should reflect on the Body Politick, the Law has provided Means to prevent it, as the Writ of *Ad quod damnum*; if any Damage be to the Subject, the Patent is naught; as the Grant of a Fair, &c. Indeed in some Cases, for the publick Good, the King may lay a Charge upon the Subject; but they are such as are absolutely necessary for maintaining of Traffick and Intercourse between one Part of the Kingdom and another; as Murage, that Goods may be in Safety; Toll, for maintaining a Fair or Market; Pontage and Paveage, for Passage; but even here if the King should grant on no Occasion, or grant a Sum too great, greater than the Benefit the Subject should receive, it is void in Law; and there is a Judge of the Justness of the Proportion, besides the King, when a Patent comes to be question'd. And if the Law does not allow the King an absolute Power in these Trifles, shall he have it in such great Matters, where there is no Judge but himself of the Occasion or Proportion?

I observe in the next Place, where the Law allows the King to charge any one absolutely, 'tis not as a Subject, but *quatenus* a Tenant, by reason of his Tenure, which arose by a precedent Consideration and Agreement for Land: 'Tis true, the King had a Power to charge in some Cases at Common Law, till he was restrain'd by Statute, as *pur faire fitz Chivalier*, *pur file Marrier*, *pur Ransome*, and to tax ancient Burroughs; but these Aids were in respect of a particular Signiory *quatenus Tenentes*: But even in these Charges, in respect of the Tenancy, where the Charge may come often, it is not left to the King's Judgment as in Escuage, it must be assess'd in Parliament: The Aids *pur faire fitz Chivalier*, and
pur

pur file Marrier; are things that could happen but once, and so not so inconvenient to be left at the King's Discretion.

The King cannot charge but where the Subject receives a Benefit in lieu of it.

And in none of these Cases, nor I believe in any other, does the Law permit a Power of charging the Subject but in respect of some Benefit receiv'd; and if the Party will resign the Benefit, he may refuse to pay; and it is but just that they who receive the Benefit should bear the Charge.

I shall conclude with some Book Cases, where the Law doth not leave a Power in the Crown to charge, tho' it be in the King's Judgment *pro bono publico*: The King cannot at this Day create an Office with a Fee, but in Law 'tis void, *p. 11 Hen. 4. 15. 16.* And in the 13 *Hen. 4.* it was complain'd of as against Law, because it was a Charge on the People; to which the King answers, Let the Laws and Statutes be perform'd. 16 *R. 2.* the King grants a Rate upon every Barge that pass'd the Bridge, in Consideration that the Patentee had taken upon him the scouring of the River; in this Case the Patent was repeal'd. So in the Case of Lights for the Benefit of Sea-faring Men, because it was a Charge on the People. And *Fortescue de legibus Angliæ, cap. 25.* holds that the King cannot charge without Consent in Parliament.

From the Books I come to Acts of Parliament, or such Things as have the Force of Acts of Parliament: *William I.* (a Conqueror he was not, that Name began in *Edward III's* time, who for Distinction was stil'd *Edward III.* after the Conquest.) In the first Year of his Reign he granted that all Men should hold their Lands free *ab omni injusta exactione seu tallagio*, nothing was to be demanded but by Tenure: Now in those Times such Grants were as binding as Statutes are now, tho' they had not all the Formalities; and this is call'd the Conqueror's Law. And this being a Grant, if not of Right, yet of Grace, is to be taken largely for the Benefit of the Subject.

And I submit it, whether it was not upon this Ground that the Confessor laid down *Danegelt*, which was for the Defence of the Sea, as well against other Enemies as against Robbers and Pirates. The King of Men was called *Archipiratus*, that is a powerful King

King at Sea ; and by Pirates were meant strange Enemies. And by the History of those Times *Dane-gelt* was rais'd on occasion of the Irruption of the *Danes*, which was for the publick Service ; and when it was complain'd of in the Confessor's time, he damn'd it ; and if this was laid down by *Edward* the Confessor, this Law of *William I.* was but the Law of *Edward* the Confessor confirm'd.

I shall shew also that these Aids or Talliages were certainly meant in this Grant, for it is a good Maxim, that *Exceptio format regulam in non exceptis*, an Exception may enlarge the Meaning beyond the common Sense of the Word : As where I grant all my Trees, Apple-trees will not pass ; but where I grant all my Trees, except Pear-trees, there my Apple-trees pass, because it shews I meant all my Fruit-trees. I apply it thus : Here is a Discharge of all Taxes, except by Tenure, consequently all other are intended : (And I shall hereafter prove that Tenures were for the Defence of the Kingdom) And by Inference to overthrow a thing that is express, is against Law. The Words are, That there shall be no Talliage : And Mr. Solicitor will have it that the Defence of the Kingdom is not meant ; this is hard.

It is one thing to assist with our Bodies, and another to pay Money ; Mr. Solicitor indeed puts a different Sense upon those Words, *Summus Fratres conjurati ad regn' defendend'*, than we can think they import ; for these Aids can't possibly be meant here. If there be an Invasion, every Man is bound to defend ; but whether for every Defence of the Kingdom we must give an Aid, is another thing.

I now come to that Statute of King John, *Quod nullum scutagium vel auxilium ponatur* ; and that this was a Statute, appears not only from *Mat. Paris*, but the Original was shewn under Seal the last Parliament by Mr. *Selden* ; and it does not lessen the Authority of it that it is no where on the Roll ; tho' the Rolls were burnt, the Judges know what are Acts, and what not, by their own Manuscripts, or printed Books, or Tradition, and no Man can plead against an Act of Parliament *Nul tiel Record*. See 8th Report.

I next come to *Magna Charta*, 9 Hen. 3. I conceive that this was *verbatim* the Charter of King John, and had originally this Clause of *Nullum Scutagium*: We have no original Inrollment of *Magna Charta*, none but that of King John's. It is possible these Rolls might perish, but it is confirm'd the 28 Ed. 1. and exemplified: And observe, as this of *Scutagium* and *Auxilium* concerns the Subjects in their Lands, there is a Clause also that concerns the Subjects in their Persons, *Nullus liber homo imprisonetur*.

The 25 Ed. 3. is not deny'd to be an Act; but that *de Tallagio non concedendo* being so full, that it cannot be evaded, is therefore deny'd to be an Act: Indeed the Act of the 25 Ed. 1. is so well penn'd that it gave Mr. Solicitor a Colour for those plausible Answers; but the Lords did desire a better Act without those Words *No such Aids*; for *Such* being a relative Word, they apprehended Danger in it; and this appears from *Walsingham*: And how many Acts of Parliament are there that it appears not when they were made? but the Pardon of the Earls shews us that this was in the 25 Ed. 1. and we know that the Rolls of those Times were lost; and tho' they make so light of *Walsingham*, his Authority is very good among Historians.

But 'tis objected that this cannot be an Act, because it takes away those three Aids, *Pur faire firz Chivalier, file Marrier, & pur corpus redimend'*: But I answer for the Aids, they were not included in the Act, for the Aids therein intended are between the King and his Subjects, and not between the King and his Tenants; and these Duties arise not from the King's Commands, but from the Laws, and so not within the Words *Nullum auxilium ponamus*.

And to say Shipping was not meant, because the Practice has been contrary; let me establish the Laws, and no matter for the Practice: We must reduce Precedents to Laws, and not Laws to Precedents; and notwithstanding the Practice, the Subject made a continual Claim against them: And I have found an ancient Manuscript where this goes under the Name of *Statutum de Tallagio non concedendo*, and wherever it is cited, 'tis mention'd as a Statute. But the Answer I chiefly rely upon (if they deny

deny the Authority of an Historian for *Res gesta*, as this is) is the Judgment of the late Parliament, to which your Lordships will give all Reverence: This Question was debated in both Houses, and both His Majesty and his Council agreed it was a Law.

I have shewn that the Acts of 25 *Edw. I.* was made against Aids and Talliages, though for the publick Defence: And this appear'd from the Articles whereon the Statute was made, and the King's Answer to them: And it is enough for me, that in the Commission, in pursuance of the Articles, they are among the *Gravamina*, and so to be enquir'd of. And that the Words, *il ferra taunt ils tenerout appayer pour Reason*, should signify no more than that the King would give a Reason for it, is something strange: The more natural Construction is, that they should receive a Satisfaction for what they had suffer'd.

I come now to the 17 *Edw. III. Parl' Roll.* Commissions had been awarded to the Shires to prepare Men at Arms for *Scotland, Gascoigne, &c.* at their own Charges, contrary to Law, whereby the People were much impoverish'd; and the King wills that it shall be so no more: To this 'twas said, that this was for a foreign War.

But I answer, since the Conquest, *Scotland* has been look'd upon to be within the Seigniorie of *England*, and so not deem'd a foreign War: And further, according to the King's Council, if a War in foreign Parts be to prevent a War at Home, this is not to be deem'd a foreign War, but for Defence.

Scotland look'd upon as subject to this Crown before *Jac. I.*

By the first of *Edw. III. cap. 5.* No Man shall be charg'd to arm himself otherwise than formerly; nor be compel'd to go out of their Counties, but upon the sudden Coming of Enemies, and in Cases of Necessity. In the third of *Edw. III.* when we were in actual War with *France*, and the Enemy threaten'd, by way of Diversion, to bring it Home to our own Doors: Yet did not King *Edward* command Supplies in this Way, from whence I strongly infer that he could not force them.

The T R Y A L of

2 *Edw. III.* The Commons pray to be discharg'd of the Guard of the Sea, and that the King would keep it at his own Charge ; but it is said this is rather a Matter of Prayer than Right ; but, with Submission, this shews a Claim in point of Right ; they would hardly have made so unreasonable a Request, as to lay it wholly upon the King, if they of Right ought to do it : But they say further, that King *Edward* gave no Relief : If he did not, this shews the Judgment of the two Houses, and as he did not grant it, so there is no expresse Denial.

14 *Edw. III.* There was a Charge on Wool-fells for the Defence of the Sea, but in the 15th it was taken away in Parliament.

25 *Edw. III.* Hobbellers were not to go out of their Counties but by common Consent ; but this, says Mr. *Solicitor*, was upon Summons *ad Exerctum*, which concern'd only those who held by Tenure : And it is true, there are some Records of the 16th and 18th of *Edw. III.* where Charges were laid on the Subjects for Hobbellers, &c. but the Money came out of the *Exchequer* to pay them. The last of these was in the 24th of *Edw. III.* and these Grievances being complain'd of, occasion'd the Statute of the 25th ; and the King repented, and desir'd to be pray'd for.

In the 50th of *Edw. III. M. 24.* there was a Complaint in Parliament against the Lord *Latimer* for laying an Imposition upon Merchandize, and he pleads the King's Command, and notwithstanding he was imprison'd, fin'd, and ransom'd.

I come now to the Resolution of the Lords in *Richard* the Second's Reign, that the Commons could not be charg'd but in Parliament : But 'tis said that the King was then an Infant. This is true, but he had a brave Man, *John of Gaunt*, for his Protector, and he had no Doubt a select Council, that nothing should be done in Diminution of his Prerogative. And the King being an Infant, it was requisite, during his Minority, things should be transacted in Parliament ; that was no usurping a Regal Power, but a provident Care of the Kingdom, and the King.

They

They say that this Consultation of the Peers was concerning foreign Wars. I answer, I admit a Mixture of Wars, and so as well for one as t'other; and however the Lords conclude, that the King cannot charge without a Parliament; and tho' *Brest* and *Calais* might then be in Danger, there is not a Word in the Consultation of a foreign War, but only as to a defensive War.

The Reign of *Henry IV.* affords many Instances that the King cannot charge, though for a publick Defence; and Tonnage and Poundage were given him for Defence of the Sea and Kingdom; and they make Protestation that it should not be drawn into Example, and yet those Times were Times of imminent Danger. And though it was objected that they were granted in the same Acts with the Tenths and Fifteenths, yet the Parliament was so wary as to sever them in the Application.

There is a like Grant of Tonnage and Poundage in the Reign of *Henry V.* with a like Protestation, that they should not be charg'd in time to come. From these Grants thus made, I infer, it was the Opinion of the Parliament they were not bound, and the King by his Acceptance of it acknowledges as much: But 'tis said this does not prove the King might not charge the Subject another Way: I answer, to what purpose was their Protestation, if the King could do it another way?

7 *Edw. IV. Parl' Roll. 1.* The King in a Speech says he will live of his own, and not charge the Commons but in extraordinary Cases, *secundum morem Majorum*, and hopes they will be as kind to him as to his Predecessor. This shews that what the Commons granted was rather out of good Will than Dury.

19 *Hen. VII. cap. 11.* Provision is made that the King's Servants, who attend him in his Wars, should be paid; and if his own Servants, then certainly others: But we are told this was in the Case of foreign Wars; but if there be such a Difference between Wars at Home and Abroad, how come the Acts of Parliament to make no Distinction?

13 *Hen. VIII. cap. 20.* The King, upon some Emergency, desires he may, by Proclamation, command

mand some things in relation to the Government, and that he may do it under Penalties: But tho' they permit him to inflict Penalties, yet they would not permit him to lay any thing upon their Goods; and if this King could have done it without them, he was as unlikely to have beg'd as any Prince that ever sat upon the Throne.

There is something indeed in the Preamble of the Act relating to the Power of the Prince in Cases of Necessity. It was thus drawn up by the King's Council, and upon this *Counsel* would have built the Royal Power of the King, but he was mistaken, and had his Reward. And your Lordships know the Power of that King, that he was not to be resisted in small things, that could pull down Abbies, and the Commons did not think it worth while to quarrel at the Preamble, when they had made sufficient Provision against such Power in the Act.

In the Reigns of Queen *Mary*, Queen *Elizabeth*, and King *James*, Tonnage and Poundage were granted them towards the Defence of the Kingdom; and if the Kings were not bound to the Defence of the Kingdom, would they have accepted it upon those Terms?

To come to the present Reign, a Commission being granted for Loans and Benevolences, in a Case of Necessity, which could not stay for a Supply another way, the King thought fit to recall it: And upon the Petition of Right, His Majesty was pleas'd to promise such things should be done no more.

Dr. Manwaring's Sermon
censur'd.

And, my Lords, there is the Judgment of both Houses upon a certain Sermon, which shew'd the Power of the King, in Case of Necessity, to charge the Subject without a Parliament. The Doctor says in his Excuse that he meant no more than to shew what Kings might do in extreme Necessity; but his Excuse would not serve his Turn: He was forc'd to acknowledge his Offence in both Houses, and his Sermon was call'd in by Proclamation: Mr. *Solicitor* indeed says the Sentence was for other Matters; 'tis true, there were other things put in by the by, but this was the Occasion of the Sentence.

I shall now shew what the Practice has ever been in the best Times; and that these Charges have constantly been decreed from time to time.

Danegelt was probably begun in the Time of the Saxons by common Consent; it was rais'd upon emergent Occasions, and was not intended as a Provision for all Times: It was continued by some of the Danish Kings, but it was in general decry'd by the People, and at length laid down by the Confessor.

Danegelt was again taken up at the Conquest, but the People made Terms with several Kings that it should be laid down. King *Stephen* promis'd to lay it down, yet sometimes he took it notwithstanding: And the Charter of King *John* put an End to it. From all which I infer, that tho' there were such a Practice, under Pretence of Defence, the People decry'd it. It was not such a Practice as could create a Law.

When *Danegelt* was laid down, then the Practice was for Shipping in the Reigns of King *John*, *Hen. 3.* and *Ed. 1.* But this was also generally decry'd, and after the 25th *Ed. 1.* and the Statute *de Tallagio non concedendo*, Proceedings alter'd. In the 29 *Ed. 1.* M. 10. he contracts for his Ships, and they go at his own Charges.

In the 9 *Ed. 2.* A Mandamus indeed issued for Shipping, and against an Enemy, and for the Defence of the Kingdom; but this was not a *Mandamus firmiter injungentes*, nor *sub pena forisfacture*, but a *Mandamus Rogantes*, and the means of compelling, *Quatenus honorem nostrum & salutationem vestram diligitis*. There is the like Command in *Edward the III's* Time; but it appears by the Writ, that he sent Money for the Soldiers Victuals, and the Writ was *pro saluatione regni*, and that we could not be safe without Shipping; and tho' *Edward III.* broke these Rules sometimes, being reduc'd to great Necessities, he repents of it, desires the Archbishop's Prayers, and in the 13th of his Reign he calls a Parliament, and demands Supplies for Shipping in a Parliamentary Way.

These Ship-Writs generally ended with *Edward III.* And from that time to *Hen. 8.* there are several Records which shew the Kings of *England* did bear the Charge of the Defence both by Sea and Land; to which it is answer'd only, that it does not appear how the King rais'd the Monies.

I come next to the positive part, to shew, that both in Cases ordinary and extraordinary, the King was by Common Law to be at the Charge, and has a Consideration for it.

Acts of Resumption; the Reason of them.

Whatever Estate is in the King, is in him in his politick Capacity, and so for the Benefit of the Kingdom, which has been the Ground of all Acts of Resumption; and it is upon the Consideration of the Interest the Kingdom has in the Estate of the Prince, that the Parliament have so often offer'd their Service to the King: The antient Lands of the Crown were not deviseable, and none could buy Lands of the Crown, because they were not alienable: Antiently, when all was in the King, he dispos'd of some for the Service of the Kingdom, from whence originally arose the Tenures; and divers Lands were given to find Ships, besides the Cinque-ports. But Mr. Solicitor objects, that all these came out of the King's Estate, and what was this to the Service of the Publick? And if the King had that Estate for himself, he had said well; but if it was originally in him *pro Regno* as well as for himself, then it is otherwise.

It has been objected further, what are a few Men or a single Ship towards the Defence? but it appears by Domesday Book the King had a great Navy; and there were sixty thousand Knight's Fees in the Conqueror's Times; and tho' some Serjeancies are turn'd into Rents, yet the Revenue is the same. This I take notice of to shew, that there was Provision made for Defence in the Institution of our Government, and more particularly for the Guard of the Sea.

The King towards the Guard of the Sea hath the natural Profits thereof, as Whales, Sturgeons, &c. He had the old Customs by Common Law, Prizes, and Impositions, and now Tonnage and Poundage, which were originally granted for the ordinary

inary Defence, but oftentimes upon emergent Occasions.

And as to the Practice of Ship-Writs, which has been so much insisted on, such a Practice as will make a Law must either be by express Consent of Parliament; or it must be such a Usage as proves a tacit Consent. 2. A Usage that will bind the Kingdom must be general over all the Kingdom, and it must be constant; and lastly it must be reasonable: These are the undoubted Rules to examine a Law by.

In what Cases
Custom creates
a Law.

As to the first, the Writs that were in the Reigns of Hen. III. Edw. I. and Edw. III. when this Practice was, are far from shewing a common Consent; and there is as little to prove, that the Practice was constant and continual; and the next thing to bring Practice to be a Law, is the Generality of it thro' the whole Kingdom. Now we are an Inland County, and your Lordships will observe, how very few Writs went over this whole Kingdom. There are some that went to some Inland Counties 'tis true, but that there were any that went through the whole Kingdom they do not shew; and they ought also to shew, that they were obey'd by the whole Kingdom; for Obedience in some Parts will not bind all, neither will once or twice make a Custom. And if we examine the Reason of the Practice: If these Writs had issued at one time over the whole Kingdom, there had been the more Equality; but if they went sometimes to one part, and sometimes to another, tho' over all the Kingdom at times, this was not sufficient to make it a Law; that Act which is unreasonable in itself, and not agreeable to Justice, will never make a Law; now when a Charge is laid upon part of the Kingdom, which the whole should bear, it is unreasonable.

As to the Reasons that have been given for this Charge, (*viz.*) *Salus Reipublice suprema lex*, and that *private Property must submit to publick Safety*: The Question is not, what we may do when Necessity requires, but what is the positive Law of the Land; whether our Forefathers did conceive it for the publick Good to leave a Power in the King to lay a Charge upon the People: If I should admit, that

in time of imminent Danger, private Property becomes publick, there is no Mischief in this ; for as *in furore belli* all positive Laws must cease, and the King may command my Property, so may any Subject command the Property of another : So 8 Ed. 3. to prevent the Enemy's landing, Bulwarks may be built on another's Land without Consent, not only by the King, but any Subject ; and the Law of Necessity is the Warrant.

But what is very considerable in this Case is what shall be deem'd a Time of Necessity : It must be a Danger now acting, or *in proxima potentia* ; as Fire, tho' not burning, yet ready to burn ; there must not only be a Fear of Fire, but a House must first be actually on Fire before another can be pull'd down, and such a Danger, that if it be not pull'd down another will be lost : And so in Case of an Enemy.

There must be real, apparent and impending Danger to justify the entring on another's Property.

A Subject may not out of fear of an Enemy build a Bulwark upon another's Land, but when an Enemy is actually coming ; and Property yields not to a Fear of Danger, but when Help must come *aut nunc aut nunquam* ; not when the King will think there is Occasion to exert his Power : In 88, Tho' the Queen and State did command the burning such things if an Enemy landed, (which was a lawful Command) yet she could not command them to burn their Corn before the Enemy did land : The King may command the Destruction of the Suburbs to prevent an Enemy posting himself in them ; but if there was only a Fear of War, and the King should command it, how far that would be justifiable, I submit to your Lordships.

Goods may be thrown over-board in a Storm, but not for fear of a Storm.

The Difference appears in *Duffield's Case*, 12 Jac. If there happen a Storm, or the Vessel spring a Leak, the Master may justify throwing over the Goods ; but if he see a Cloud arise, and out of Fear throw them over-board, I doubt it would go against the Bargeman : All positive Laws do cease in time of extreme Danger ; but whether all Laws, in relation to any Person, and Liberty, cease when the Danger is but conceiv'd, and not actual, your Lordships will determine.

And

And where any thing is taken for the publick Good, the Sufferer shall have a Recompence made him for his Loss on Application to the Parliament: What is taken for the publick Good is but borrow'd; and so in case of throwing Goods over-board, every one who has any Concern in the Ship shall bear a Share in the Loss: But it was urg'd that the King might as well be intrusted with this Power as that of shutting up the Ports, or making War and Peace. To which I answer, That the King is the greatest Loser by shutting up the Ports, if there be not a Necessity for it; and besides there is no Law against it, as there is in this Case.

Damage received on Account of the publick Weal, shall be repair'd by the Publick.

And in Case of War still the King's Charge is greater than the Subjects, and consequently there could be no great Danger in allowing him this Prerogative: And as for the King's Power in dispensing with the Penalty of a Statute, or the Power of pardoning; it is one thing to have a Power in Point of Favour, and another in Point of Charge.

And admit the King could command his Subjects to find Ships, whether he can give a Power to the Sheriff to make an Assessment, as in the Writ, is a Question: In all politick Charges, the Law takes care they should be equal, as in Case of Subsidies and Fifteenths; and in *Danegelt* they tax'd by Hides, so that there could be no Inequality; but how a Sheriff should have that Knowledge to charge Mens Estates, I am at a loss to know; and tho' the Law may trust the King, must it trust the Sheriff, nay the Under-Sheriff? Assessments are usually made by others, and not by the Sheriffs. If a Hundred be charged, they have Ways of laying it on themselves proportionably.

And admitting a Levy may be thus made, it is another Question whether the Money may be brought into the Exchequer by *Scire facias*: I believe this is the first Writ that ever was of the kind; it not only gives a Power of levying, but it prescribes the Way, viz. by Imposition, by Distress, by Selling. I know no Case can match it.

The Argument of Sir John Banks, his Majesty's Attorney-General, in the Exchequer-Chamber, in Behalf of his Majesty, in the Case of Ship-money.

Mr. Attorney's
Argument for
the King.

Sir John Banks : I shall lay down this Position, That the King, as he is King of *England, pro defensione Regni, tuitione maris, &c.* when in his Judgment he conceives it a time of such Danger as necessarily requires the Aid commanded in this Writ, may command and compel his Subjects, *per totam Angliam*, to set forth Ships with Men and Ammunition and double Skippage, as well by his Writ under the great Seal, as by Consent of Parliament.

And I shall first shew that this Power is *inter jura summe Majestatis*, innate in the Power of an absolute King, and in the Persons of the Kings of *England*. That this Power was not deriv'd from the People, but reserv'd to the King when positive Laws first began : And that the King is sole Judge of the Danger, and how it is to be prevented.

2. That the regal Power is not confin'd to the politick Advice, that he must do it fitting in Parliament ; but that it has ever been done either *per ipsum Regem*, aut *per Regem & Concilium*, aut *per Dominos suos* aut *per Regem*, when he was pleas'd to call a Consultation of experienc'd Merchants and Portsmen.

I shall shew that this Power is so inherent in the King, that when Parliaments were sitting, these Writs have issued by the regal Power, without the Assistance of Parliament, and that their Advice was not thought necessary heretofore ; and I shall make it appear that this Power is implied in the Titles given the Sovereign by the Common Law.

I shall also insist upon Precedents, and desire your Lordships to observe that these Writs were not issued by any sudden Advice, but after great Searches made by Mr. Noy, my Predecessor, and others of the King's Council, and a great Number of Records were maturely consider'd before the Writs issued.

My

My Lords, I shall not here discourse of the Law of Nature, or the Law of God, which commands Obedience to the Ordinances of Superiors; nor of the Law of Nations, which agree that there must be Protection from the King, and Obedience from the People; nor of the imperial Law, which says, *pro communi utilitate*, the King may *statuere* alone: But I shall confine my self to the Law of the Land, and to such Authorities and Precedents as I find in the Records of former Times, and in our Books.

The Original of our Government I observe was not Monarchy: *Julius Cesar* found a great Number of petty Regimens amongst us, no less than four Kings in *Kent*; so that those Times are not material: During the *Roman* Government, which continued five hundred Years, they had their Prefects here, who no doubt commanded what they pleas'd: The *Saxons* succeeded then; and it appears by the ancient Grants and Edicts of their Princes that this naval Power was commanded by them for the Defence of the Realm.

[Next he cites several Grants of the *Saxon* Kings, wherein they, except Expeditions, repairing of Castles, and making Bridges; and mentions a Law made by King *Alfred*, the first Monarch of *England*, That no Man, on Summons by the Horn, or Word of Mouth, should sit still in Matter of Theft, Bloodshed, or going to the War, whenever his Expedition should require, upon Pain of Death.]

King *Edgar*, in the Year 959, provided a Navy of 3600 Ships, and commands that every Year, at Easter, a Navy of 3000 Ships should be set out. King *Ethelred* in the Year 1008 provided a great Navy, commanding every 310 Hides of Land to find a Ship, and every eight Hides to find a Man and a Costlet to meet at *Sandwich* to oppose the *Danes*: And according to this Rate there must be 11072 Ships, and 45450 Soldiers; but what is most material, this was done by the King's Command *per totam Angliam*.

King *Ethelred*, in the 36th Year of his Reign, commanded a naval Force to be ready every Year at Easter, under a Penalty. King *Canutus* also commands naval Preparations yearly. And these Edicts

Great Fleets
fitted out by the
Saxon Kings.

dicts I observe were by Advice of the Lords; and if they were Acts of Parliament, they stand unrepeal'd; and if they were not Acts, then this was done by the regal Power of William I. He did not abrogate these Laws, but was sworn to perform them, and did confirm them; so that if these were the Laws, and this the Power of the ancient Kings, he did ratify, but not diminish it.

The Soil under
the Sea belongs
to the King
where the Sea
leaves it.

The King of England is an absolute Monarch; nothing can be ascrib'd to an absolute Princee but is inherent in his Person, as appears by Books, Records, and Acts of Parliament: He hath the supreme Dominion both by Sea and Land, (as appears by the Mirror, the greatest Part whereof was written before the Conquest) and he has not only the Dominion of the Sea, but the very Soil belongs to the King, as was resolv'd in the Case of Sutton Marsh.

The King has the Creation of all great Officers, Judges, &c. The Power of pardoning Offences is inherent in him, and he puts a Value upon the Coin. The Law intrusts the King with the Power of making War and Peace; and where the Law trusteth, we ought not to distrust; as if he would cause Forces to be muster'd, and Ships to be provided, where there was no imminent Danger, he is the sole Judge, and we ought not to question him. Bracton says, *Rex non habet superiorem nisi Deus*. At the Common Law, if the King committed a Man by Word of Mouth, he was not repleviable; and whatever his Delegates the Judges do in their Office cannot be assign'd for Error, nor shall any one be admitted to say a Judge did not give right Judgment, or the Clerk did not make right Entries. And if the Law will not admit an Averment against any Acts done by the Judges, surely where the King is absolute Judge, and shall declare there is Danger, no one shall be permitted to say there was no Danger, or that the King has done what he ought not to have done: The King is so absolutely trusted with the Defence, that a Subject cannot erect a Fort or Castle, without the King's Licence, even upon his own Ground. It has been objected indeed there must be a concurrent Power, a politick Advice in Parlia-

Parliament; but I shall shew that the King alone, for the common Defence of the Realm, without the Aid of Parliament, may *Statute*, &c. And this is agreeable to Reason; for Kings were before Parliaments, and then surely they might do it, 12 Hen. 7. fol. 17. b. per *Fineaux*, &c. There was a time when there were no municipal Laws, when positive Laws were not establish'd, but Kings rul'd their People according to natural Equity. Since there have been positive Laws, it appears by the Records cited that they have ordain'd, they have prescrib'd the time for issuing these Writs, the Number of Ships, the time of Rendezvous, and their Munition, and to stay for the Defence *quamdiu nobis placeret*.

This is agreeable to the King's Ordinances in other Cases, 24 Ed. 3. The King commands by his Proclamation, that no Earl, Baron, Knight, Esquire, or other Men at Arms, shall depart the Realm, and he that disobey's shall be fin'd. He commands that no Victuals should be transported, &c. And is any thing more common than for the King to impower a Corporation to make Ordinances for the common Good, 49 Ed. 3. 162. And shall the Creature have this Power, and not he that makes the Creature?

And in all Times, as well the Incidents to the Defence, as the Defence it self, have been allow'd to be in the King: For instance, the Murage of Towns. The King has ever commanded this to be done at the People's Charge, (the Precedents are so many 'tis needless to mention them) and shall he not command the wooden Walls for the Defence of the Sea? Has he not always exercis'd a Power of laying Embargoes on Shipping for the Defence of the Realm? It appears by the Precedents cited that the Kings of *England* have in all Ages by themselves, by their Council, their Judges and their Peers, made these Ordinances for Shipping, and have been obey'd.

And even while the Parliament has been sitting, and granted other Supplies for the War, these Writs for setting out Ships have been issued by the regal Power, which is a strong Argument the King needs not the Aid of Parliament to command his Forces.

Forces. [Here several Precedents are cited to this purpose.] And the 13 Ed. 3. the King condescending to pray Advice of the Commons, and Assistance for the Guard of the Sea, the Commons disclaim it, and say they have no Cognizance of it.

The third Thing whereby I propos'd to shew the King's Power was from the Titles given him by the Common Law. *Bras. lib. 2. cap. 24.* says the King is *Vicarius Dei*; 20 Hen. 7. fol. 4. *Rex est capitalis Justiciarius totius Anglie*; 11 Rep. fol. 72. The King is the Fountain of common Right, &c.

I shall now proceed to shew that the Precedents cited have not been grounded upon any particular Covenant or Charter, but upon the Law of the Land, and upon such Reasons as are constant and irrefragable, and bind all the King's Subjects, as well Clergy as Laity, *Scot. 10 Ed. 3. M. 12. Quia consonans Rationi quod omnes tangit per omnes supportari.*

Claus. 9 Ed. 3. M. 11. *Pro defensione Regni omnes teneantur*; Rot. 12 Ed. 3. M. 1. Dorl. *Omnes & singuli tenentur se & sua exponere*; the same Roll, M. 12. Dorl. *Omnes & singuli ad defensionem Regni astricti*; 13 Ed. 3. M. 13. Dorl. *Ex ligeantia ad defensionem Regni & Vestri & Vestrorum*, &c.

And that these Writs have issued by the King's Mandate, either by the King only, or by the King and Council, without Advice of Parliament, I have collected above 500 Precedents, with which I shall attend your Lordships: And shall not these Precedents, some of them before William I. and for so many hundred Years, make a Rule; and tho' they had been discontinued since the 50 Ed. 3. as Mr. Holborne would have it? The King can lose nothing by Discontinuance of time, according to the Rule of Law; and to say we cannot shew that these Writs have issued in all Times, is a strange Objection, this being but a casual Service: But Mr. Holborne is mistaken, these Writs do not end with Ed. 3. A great Number of Ships were commanded into the Service in the Reign of Hen. 6. &c.

But it hath been said the People have always petition'd against it, and we must shew a Consent if we would make it good by Custom; and it has been said also that when such Petitions have been preferred,

fer'd, the King has not deny'd them expressly. My Lords, I shall shew hereafter, that notwithstanding these Petitions, this Service hath always continu'd ; and as for the King's Answer, the Words have been *Le Roy se avisera*, which has ever been look'd upon as a genteel Denial.

It has been objected also, that tho' Writs have gone out, it does not appear they have been put in Execution. To which I answer, It appears by the Monuments of those Times that the Service hath been done, that the Mariners Wages have been paid by the Country, and that some Men have had particular Discharges, for that they were in the King's Service, or liv'd by the Sea-coasts, and have plead-ed such Discharges, and had them allow'd, 23 Ed. 3. M. 14.

I observe further that these Writs have gone forth not only in Cases of actual War, or of an Invasion, but at such times as the King conceiv'd that Danger might ensue, Rot. Claus. 48 Hen. 3. M. 2. We have the Writs in Court *cum necessit' ad defensionem Regni esse promptum*, &c. Claus. 23 Ed. 1. M. 5. *Quia volumus quod partes marit' in Com' Essex, &c. contra inimicos diligenter custodiend' forsan si in partes illas venire contingent*. It appears the 25 Ed. 3. that the French Fleet was not upon the Coast of England, but Britany ; but the King hearing they had an Intention to invade the Realm, sent Orders for providing Ships : The Words us'd in those Writs are, *Ut Audivimus, Ut Intelleximus, quia vulgaris opinio Regnum nostrum Anglie invadere* ; therefore he commandeth Shipping by Sea, and Forces by Land. [Then he produc'd a Multitude of Precedents, shewing that these Writs had been issued at the same time Supplies were given in Parliament.] [Next he cited many Precedents to prove that these Aids were not only requir'd of the maritime Towns, but from the Inland Counties *per totam Angliam*.] By these Precedents it appears that the Service is commanded to be done by the inland, as well as the maritime Counties, and that the same Reasons bind the one as the other : If the maritime Counties be in danger, the inland can't be safe ; and the Rule of Law is, Every one that receives a Benefit, must afford Contribution.

My

My Lord, I observe that the Ports by the Charter of Ed. 1. were to find 32 Ships; but when the Necessity of the Service requir'd, all their Ships were press'd into the King's Service. At this Day the Ports are utterly incapable of performing the Service they did heretofore, when the greatest Part of the Trade was in the Ports. Few Ports have any Trade now but London, Newcastle, Bristol, and Hull: The Wealth of one Portsman in those Days was as much as the Wealth of a whole Town now. And admit the maritime Towns were yet bound to this Service, if their Ability fail, and they cannot do it, is it not agreeable to the Rule of Law that it shall be requir'd elsewhere? Before there were any Commissions of Sewers, and a particular Man was bound to defend the Sea Banks; if the Man was not able, the Service was requir'd of the County, for by it they might receive Gain or Loss; and agreeable to this was the Case of the Isle of Ely, all that had *Salvationem & Damnificationem* should contribute. But it has been objected that there are Precedents where *Navale Subsidium* has been requir'd from inland Places, and they have been discharg'd thereof, as Pat' 2 R. 2. pars 2. M. 42. Dorset. The Town of Beverly petition'd, being charg'd with the Town of Hull towards finding a Ship, and were discharg'd: But Beverly was discharg'd by Vertue of a Charter of Exemption granted them, in *Honorem St. Johannis de Beverly*, the King's Confessor. And other inland Towns have been discharg'd, 'tis true, when the Admiral's Commission did not extend to them: So that their telling your Lordships of Places that have been discharg'd *de custod' maris*, and not giving the Reasons, is nothing to the purpose.

The next thing I come to shew is, That Writs have been issued for the Defence of Sea and Land, wherein no Cause has been declar'd, no manifest Danger, or declar'd against what Enemy: As Rot. Pat. 14 Hen. 4. M. 5. A Writ commanding the Sheriffs of Kent and Sussex to arrest all Ships in those Counties to be at Portsmouth, ready to go into such Service as we shall command. So in the Times of Ed. 1. Ed. 3. and Ed. 4. and Hen. 6. Writs have gone out, and the Service has been conceal'd, which is agree-

able to Reason, for Resolutions of War are not always fit to be communicated ; and yet this is the Objection that has been made to the Writ of the 4th of *August*, that the King has not declar'd sufficient Cause for issuing it, he hath not acquainted the Council at the Bar with what ought not to be communicated even to the Privy-Council, but is reserv'd to the Council of War : But had there been fewer Reasons, it had been more agreeable to former Writs.

And notwithstanding what has been objected to the Writ of the 4th of *August*, I find in ancient Writs the same Matter and Power of Assessment ; sometimes Levies by Distress and Imprisonment, nay, Seizure of Lands and Tenements, Goods and Chattels, and that it was at the Charge as well of the inland Towns as the maritime ; as appears *Kot. Scoc. 8 Ed. 2. M. 9. de navigio providend', &c.*

As to Escuage being assess'd in Parliament ; if it were so, this is not a Service due by Tenure, but to the King from his Subjects ; and at Common Law the King might require an Aid uncertain, and assess it as he pleas'd, *Glanvile, lib. 9. cap. 8. Brit. fol. 37. cap. 27. Bract. Lib. 4. cap. 16.* And who can tell what the Preparation must be, or the Charge thereof ? If they could shew an Act of Parliament that limits the King for the Defence of the Realm, they would say something.

They say further, that the Sheriff is not a proper Officer, not sworn to execute this Writ. But is he not sworn to execute all Writs that shall be deliver'd to him for the King's Service ? And these Writs have anciently been directed as well to the Sheriff as to Commissioners ; and the Lands of Sheriffs and other Officers have been extended, because of their Negligence in executing these Writs : And for the manner of levying *per districtiones*, and by Imprisonment of those that do refuse, it has been so in all the Precedents that have been vouch'd : And as to Distresses, if the King make a Corporation, and impowers them to make By-laws for the common Good ; and an Order be made for Payment of Money, and that those who refused to pay shall be distrain'd : This is adjudg'd a good By-law, *3 Rep. fol. 64. Clerk's Case.* I i And

Corporation
may distrain for
Breach of a
By-law.

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And as to the Penalty in this Writ: Penalties have gone higher in former Writs. In that Roll, 10 Ed. 3. M. 11. *Dors.* Lands, Goods and Chattels, were to remain in the King's Hands; and M. 2. is upon Pain of Death, &c. so that Mr. *Holborne* was mistaken in this Point.

Ships provided at the Subjects Charge on the Spanish Invasion.

And as to the Distance of Time, they say there were seven Months between the Teste and the Return, and a Parliament might have been call'd; but their Preparations go on slowly, and the King might have been disappointed; and the time of Preparation and Continuance has ever been refer'd to the Wisdom of the King: And on the *Spanish* Invasion I find by the Books in the Council-Chamber that the Preparations against them were in *Octob.* 87. and the *Spanish* Fleet did not set sail till *June* 88. and I find no Parliament call'd that Year. And by Letters and Order of the Council-board those Ships and the Defence were *ad sumptum* of the Subject; so that there is not any Particular in this Writ, but is warranted by former Precedents in a higher Degree. [Here Mr. *Attorney* added several other Precedents, shewing that the Defence that had been made by Sea and Land was not only by the Port-Towns and maritime Places, but *per totam Angliam.*]

I propose in the next Place to answer their Objections; and first, the Acts of Parliament they have produc'd: As to that of *Will.* 1. Whether an Act or a Charter, the Words are, *Volumus & concedimus quod omnes liberi homines sint quieti ab omni tallagio*; but I open'd to your Lordships that this Power in the Writ was inherent in the Kings of *England*, and there is no more in this than in the other Concession, that they shall be free *ab omni injusta exactione*; the other Part of the Law explains it, *Quod sumus Fratres conjurati*, for the Defence of the Realm.

Then they insist on the Charter of King *John*, or *Magna Charta*, as they call it; but this they acknowledge was granted at *Romney Meads*, when there was an open War made upon the King by the Barons, and it was in truth an Act forc'd from a distressed King, and not assented to in Parliament; and shall this bind the Crown? There were other things also very derogatory to the Prerogative of the Crown;

Crown ; and the King being better advis'd, the same Year recall'd it, nor was it ever confirm'd or insist'd on since, tho' the Stat. of *Magna Charta*, 9 Hen. 3. has been confirm'd thirty-one times: However, the Words are no more than these, *Nullum Scutagium vel auxilium nisi per commune Concilium Regni nostri*. Now this doth not extend to take away any thing that of common Right belongs to the Crown, and so the Judges have resolv'd that Aids due of common Right are not taken away by general Words ; and the Words in *Magna Charta*, 3 Hen. 3. are, *Nullus liber homo capiatur aut imprisonetur nisi per legem, &c.* which general Words no ways impeach the royal Power : Besides, in the 14 Hen. 3. and in the Reigns of the succeeding Kings these Writs were issued ; which could not have been, if they had been taken away by *Magna Charta*.

As to the Statute *De Tallagio non concedendo*, I give much the same Answer ; that it takes away no Aids that are due by the Laws of the Realm, for there is not so much as any Exception of an Aid to marry the King's Son, or marry his Daughter, and yet it is agreed these Aids are not taken away ; so that these general Words *Nullum auxilium* will not do, if this be an Aid due by the Laws of the Land. Besides, this is not properly an Aid, but a Contribution of King and People for the Defence of the Realm ; it is *ad proficiscendum cum navibus nostris*, and is a Power *inter Jura Majestatis*, one of the highest Prerogatives of the King, and shall never be taken from him : It was never given him, but is taken by his royal Power ; and the Statute of the 25 Ed. 1. speaking of such Aids as have been given, excepts such as have been due and accustomed.

And the Practice in the Reigns of Ed. 1. Ed. 2. Ed. 3. and R. 2. shews plainly that it was never intended by the Statute to take away this royal Power.

As to the Statute of the 1 Ed. 3. cap. 4. it says that none shall be compell'd to go out of his Shire but where Necessity requires, and this Writ requires no more but where there is a Necessity in the King's Judgment.

The next Statute is the 1 *Ed. 3. cap. 7.* where Men at Arms being sent into *Gascoigne* and *Scotland* without Wages, the King says it shall be done so no more: This relates to foreign Wars, and so is nothing to the purpose. The Statute of 18 *Ed. 3.* speaks of Men at Arms, Hobbellers and Archers, being at the King's Charges out of *England*; but he that goes for the Defence of the Sea, cannot be said to be out of the Kingdom: See 6 *R. 2. Protection*, 40.

The Stat. of 25 *Ed. 3.* says indeed that no Man shall be compelled to find Men at Arms, Hobbellers and Archers, but those who held of such Service *without Consent*; but this with the former Statutes is recited in the 4 *Hen. 4.* where 'tis enacted they shall be firmly kept in all Points, so that the 25 *Ed. 3.* doth not repeal any of these; and the 1 *Ed. 3.* reserves a Power to the Crown in case of Necessity, or sudden coming of Enemies, therefore this Power is not impeach'd by the 25 *Ed. 3.*

As to the Resolution of the Peers the 2 *R. 2.* that the Commons could not be charg'd but in Parliament; this is no Act of Parliament, and was in the Nonage of a young Prince, who did not assent to it: And whereas it has been objected that some Subsidies were granted, 9 *R. 2.* and the 8 *H. 4.* with a Protestation or Condition they should not be brought into Example; the accepting these Subsidies does not take away the royal Power, or prejudice the Crown.

The next Statute objected was 1 *R. 3. cap. 20.* that the Subjects should not be charg'd by any such Exaction or Imposition: But this is no Benevolence, but a legal Due. Then they object the Statutes of Tonnage and Poundage granted for the Defence of the Kingdom.

Tonnage and Poundage taken by King *Charles I.* without an Act of Parliament for it.

To this I answer first, there is no Act of Tonnage now in force, those Duties are not now taken by Virtue of any Statute: And those Acts that have been made for granting Tonnage and Poundage, make for the Crown. Those in the Reign of Queen *Eliz.* and King *James* were given towards the Defence of the Realm, and Safeguard of the Sea, and not for any extraordinary Defence: Besides, it is

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acknowledg'd in these Acts that these Aids are of necessity, and cannot be wanting at any time without an intolerable Expence to his Majesty.

The next thing mention'd is the Petition of Right; but it was declar'd by all that there was no Intention by this Petition to lessen the King's Prerogative; and the King granted nothing new, he did but confirm the ancient Liberties of the Subject.

But Mr. Holborne scandalously insinuates that the Savings in several of the before-mention'd Acts were never intended, but crept in by the King's Councils penning the Acts: These are bold Assertions, as if any Clauses should be added by the King's Council that were no Part of the Record; but have the Parliament Record here, and these Exceptions are recorded as fully as any thing else, and such Assertions ought not to be made against Laws made so long since. He might as well make these Objections to *Magna Charta*.

Acts of Parliament
anciently
drawn by the
King's Council.

They have objected also out of the Parliament Books, 33 Ed. 1. That upon Petition to the King to have Restitution of Money taken, the King order'd Satisfaction to be made: But this was for Monies taken to the King's Use, and therefore 'twas reasonable Satisfaction should be given.

They produce also a Record, Pat. 26 Ed. 1. M. 21. to prove that several Commissions went out to enquire de *Grievantibus* of Wools, &c. taken *pro custodia maris*; but these Commissions are nothing to the purpose, for the like Commissions issue daily, where Men are unequally taxed, to enquire into Grievances of that kind, which does not at all impeach the royal Power.

And as to that Objection, that the Kings of England have consulted the Parliaments about the Defence of the Realm, and Aids and Subsidies for Defence have been granted in Parliament; I don't see how this takes away the King's Prerogative.

They tell us further, that the 12 Ed. 3. the King was so penitent for having taken these Aids, that he sent to the Archbishop to pray for him; but it appears he only desired the Archbishop's Prayers for a good voyage, as he did in several other Years of his Reign.

Whether the
King can erect a
new Office with
a Fee.

They insist much also on the Parliament-Roll, 13 Hen. 4. M. 43. Where the King having constituted an Office for measuring Linnen Cloth, with Fees, the Parliament declare it a void Office; and from thence they infer, that if a new Office be granted with a Fee, 'tis void in Law: But the reason why this was a void Grant was, because it appear'd that the Office of measuring Woollen and Linnen Cloths was but one Office, and the King's granting that to one, which belong'd to another, made the Patent void: And if the reason they give would hold, viz. because it was granted with a Fee, many Offices erected for the publick Good would be void; as the Office of *Subpena's* in Chancery, &c.

They object, in the next Place, that these Contributions are in effect Impositions, which cannot be impos'd on the Subject but by common Consent in Parliament. My Lords, I have not in all my Argument insisted on a Power of laying Impositions, nor is it at all in question; for no Man's Property is invaded, or any Man's Goods seiz'd, unless he incur a Forfeiture by Contempt, and by a willful Contempt the Subject may lose his Property, Dyet 16. and 13 Eliz. 296. If the King command a Subject to return Home, and he refuses, he shall forfeit all his Goods for his Contempt; so if one wilfully contemn the King's Writ, he may be distrain'd; and this is no Invasion of his Property.

The Subject
may incur a
Forfeiture for a
Contempt, and
no Infringe-
ment of his
Property.

As for the Sentence against the Lord *Latimer*, he himself laid the Impositions, and thereby took upon himself royal Power, and was justly sentenc'd.

And for the Sentence of Dr. *Mannering*, it is nothing to the purpose; this Writ does not deny the Property to be in the Subject; nor does it follow, because the King hath paid the Wages of divers Mariners, that therefore he cannot command them into the Service.

As for the calling in Dr. *Cowell's* Book, there were three Causes express'd; one whereof was, that he had writ things derogatory to the Crown.

They object further, That the Revenues of the Crown will defray all the ordinary and extraordinary Charges; That the Tenures by Knights Ser-

vice, &c. and the Profits of the Sea by Sturgeons, Whales, &c. are reserv'd for this purpose. But are these a sufficient Defence for the Kingdom? or will they say that the King's Revenues will answer more than his annual Expence?

They have indeed granted one Case, viz. That the King may grant a Toll in a Fair or Market, Pontage, &c. because there is an *Ad quod dampnum*; whereupon an Enquiry shall be made, *Si Patria gravatur*; but the King may grant a Fair without an *Ad quod dampnum*.

It has also been mightily insisted on, that there needs none of this Command by the King's Writ to furnish Ships, for every Man by the Instinct of Nature will contribute to the common Defence in a Case of Necessity. But surely this was said only to captivate the People; for what must be the Consequence, if every Man was left to be his own Defender? God was pleas'd to chuse Captains and Leaders to command his People; but to assert that the People are at Liberty to make what Defence they please, is a strange Position.

It has been also said, *Better sustain a Mischief than an Inconvenience*, whereby every Man's Property is taken from him as often as the King pleases; but the Loss of the Kingdom, wherein is included the Loss of Liberty and Estate, is not among the Mischiefs intended in that Maxim, for this is a Mischief that destroys both the Head and Members; therefore I wonder to hear Mr. Holborne apply that Rule to this Case, *Better a Mischief than an Inconvenience*.

They say further, that the 2 Hen. 4. a Commission for building Barges was recall'd at the Petition of the Commons; but it does not appear they were for the Defence of the Realm, and the King's Answer was no more but that the Commissions should be recall'd for that time, and for the future, in Case of Necessity he would advise with his Lords.

I come now to their Exceptions to the Writs, that it does not appear there was a sufficient Danger, &c. to which I have already given an Answer: They say also, that the King's Testimony is insufficient; but with their Favour, the *Teste meipso* is without Exception, we are bound to give Credit to it, 1 Eliz.

Whether it be consonant to Law, or Reason, that every Man should be left to make what Defence he pleases in case of a sudden Invasion or Rebellion.

Whether the Loss of the Kingdom, and all we have, be not a greater Mischief than allowing the King a Power to compel the Subject to contribute to his Defence in a Case of Necessity.

fol. 105. *Ne exeat regno.* The King affirms J. S. will go beyond Sea ; this Averment is not traversable, you shall not aver against it : And the Case mention'd by Mr. Solicitor, *Hill. 20 Ed. 1.* was mistaken by Mr. Holborne ; for it was not the Saying of the King's Council, but of the Court, of the Judges, *Quod Dominus Rex est superlativum Record & preexcellens* : And shall we give Credit to the Marshal of the King's Host, to the Certificate of the Captain of a Company, to the Bishop, to the Mayor and Aldermen, (by the Recorder) as *5 Ed. 4. 30.* and will you not admit of the Certificate of the King by his *Mittimus* ?

Their next Exception is to the *Scire facias*, that it ought not to issue for this Debt.

1. For that the Writ the 4th of *August* directs it to be levy'd by Distress. 2. Because it is no Debt to the King. But, my Lord, whoever shall detain any publick Duty, may be question'd by the King for it, as Head of the Body Politick ; and whatever things are *pro communi utilitate*, may be levy'd by Process out of the Exchequer, in the King's Name, nothing is more common.

[Here Mr. Attorney produc'd abundance of Records, where those who refus'd to contribute on ancient Writs were certified into the Exchequer, and Process went out of the Exchequer to take their Lands and Goods into the King's Hands, and to imprison their Persons, &c.] And having briefly sum'd up the Force of his Arguments, he added, There is no Act of Parliament to deprive the King of this Power, and the judicial Precedents that have been cited affirm it ; and were there no Law to compel the Performance of this Duty, Nature, and the inviolable Laws of Self-preservation ought to move us : Let us therefore obey the King's Command by his Writ, and not dispute it ; he is the Center wherein we all meet, the Soul of this Body, whose proper Act is to Command ; but I need use no Persuasions to induce your Lordships to do Justice, and therefore humbly desire Judgment for the King.

*The Argument of Sir Francis Weston, Knt. one
of the Barons of the Exchequer, in the Case of
Ship-money.*

I am to deliver my Opinion upon this Record, and I conceive there is sufficient Matter to charge Mr. Hamblen with this 20 s. and therefore I give Judgment for the King: There is a Rule in Law, that if a Man demurs generally to a Writ, he confesses all the Matters of Fact that are alledg'd; so that all the Dangers alledg'd in the Writ are by the Demurrer of the Defendant confess'd. But it is objected we are tied up to the Writ of the 4th of August, that being the Ground of all: I answer, If the Defendant had rely'd upon that Writ, it might have been so; but in his Demurrer he says, that the Writ, with the rest of the Proceedings and Schedules, do not contain Matter sufficient; so that we must now give Judgment upon the whole, and it is confess'd that in the Writ of *Mittimus* it is said, *Salus Regni periclitabatur*.

*The Argument
of Sir Francis
Weston.*

It is objected further, that *Salus* signifies Health; but it also signifies Safety, both in the Poets and Historians.

But as to that Objection, That in the Writ of the 4th of August the Danger is not fully set forth; I answer, It may not be fit to declare to all the World the Danger the Kingdom is in; and I find even in the Writ of the 4th of August, there is not only a Danger from Pirates mention'd, but that the Dominion of the Sea is like to be lost, and that there is great Peril apprehended in this time of War, Dangers surround us.

And whereas 'tis suggested that this is only a Pretence, and that the Kingdom is not really in Danger, and that this may be made annual, and even perpetual.

These are unworthy Suppositions: I am satisfy'd the Kingdom was in danger, because 'tis said so in the Writ: I ought to believe so, when the King hath declar'd it: And further, No Man but must believe the Kingdom is *de facto* in danger, when for three or four Years past there have been such great Navies

Navies at Sea, and such Forces by Land in the neighbouring Nations; and had we but an ordinary Defence at Sea at this time, we should be expos'd to Insults and Invasions: In *Hen. 7th's* time, it appears by the Record, *Pat. 1 Hen. 7. Pars 3.* there were Wars between the King of the Romans and the King of France, both of them Friends to this Crown; yet there being such great Forces abroad, both by Sea and Land, the King would not trust them, but issued Proclamations for keeping Watch and Ward upon the Sea Coasts, and commanded his Subjects to be ready upon a short Warning; which is a very good Example for the Course that is now taken.

It is also objected, that Money is commanded to be levy'd for providing a Ship; but when this great Sum is collected, it may be disburs'd no body knows how.

I answer, A Ship is to be provided, and the Sheriff is to rate the County, *secundum facultates*, towards it; here is nothing said of Money to be paid to the King.

They say further, That the Writ commands the Imprisonment of the Party, and his Liberty is dearer to him than his Life; and his Goods, in which he hath an absolute Property, are to be taken away: I answer, The *Scire facias* is not to shew Cause why he should not be imprison'd, or his Goods sold, but why he should not be charg'd with the Money assess'd upon him.

It is said that the general Defence of the Kingdom lies upon the King, because he hath a Consideration for it: He hath Knights Service, Escuage, and other Services; but these were Tenures reserv'd on several Grants made by the King, and he is no more bound to defend the Kingdom on this Account than his Subjects, who have the like Tenures; and as to Wards, Marriages, Reliefs, &c. these are but the Fruits of the Tenures, and they are casual; and if he be not bound in respect of the Tenure, neither can he by the Fruits of them.

It is objected also, that he hath the Profit of the Sea, royal Fishes, Whales, Wrecks, Treasure, Trove, Mines, &c. I answer, These he has by Prerogative, and not for Defence.

It

It is said further, that he hath the Service of the *Cinque Ports*, and other Places, and all manner of Customs, in regard of which he is to provide for the Defence of the Sea: 'Tis true, these are for the ordinary Defence; but does any Man think in his Conscience that the King is able out of these to prepare a Royal Navy, without the Assistance of his Subjects?

'Tis said the King has paid the Soldiers their Wages; I admit, it for the ordinary Defence; and that he has repaid some Money he had promis'd: Every honest Man ought to perform his Promise; but what can be infer'd from hence?

I shall now descend to Particulars, and consider,

1. The Ports. 2. The maritime Counties. And
3. The inland Counties.

By the Red Book in the Exchequer, the *Cinque Ports* are to find 52 Ships, and 24 Men to each Ship: The Ports at large are tied to no certain Service, it appears by the Records that the *Cinque Ports* have been charg'd with more than their *Quota*, and the Ports at large equally with them; *Pat. 23. Johannis, M. 6.* The King by his Writ commands the *Cinque Ports*, *Quod omnes naves parare, &c.* not any certain Number, *Claus. 17. Johannis, M. 7.* The King sent his Writ *Baronibus suis de Rye, Quod venire faciatis omnes naves apud quinque portus*; *Claus. 14. Hen. 3.* A Writ to *Portsmouth*. A Port at large to provide a Galley, *& quod prompti & parati sint ad proficiscend' cum necesse fuerit.* A Writ to *Guernsey*, to provide a Ship when Need should require. Another to *Southampton*, *sumptibus propriis*, and no Promise to repay them; *Claus. 20. Ed. 2. M. 7.* A Writ to the Sheriff of *London*, reciting a Charge formerly laid on the City, and upon *Kent*, to find twelve Ships; the City nine, and *Kent* three, and forty Men in each Ship, *ad sumptus illar'*, &c. *Rot. Scot. 10. Ed. 3. M. 12.* A Writ to *Waremouth*, reciting the general Obligation they were under to defend the Kingdom, almost in the same Words with this Writ, and that every Man should be affeas'd *juxta statum & facultates, ultra illam pecuniam summam debet pro servitiis.* *Pat. 22. Ed. 3. Part 4. M. 3.* A Command to the Isle of *Thanet*, that every one, from sixteen to sixty, should be ready to defend the Coast, *juxta statum & facultates.*

What Service the *Cinque Ports* were anciently bound to.

Precedents where the Subjects were compell'd to find Ships at their own Costs.

I come

Land Forces
rais'd to defend
the Coasts.

I come now to the Maritime Counties, 23 *Ed. 1. m. 5. Dors.* Writs were directed to the Sheriffs of *Southampton, Dorset, and Wilts*, three Maritime Counties, to raise 3000 Men to defend the Coasts. *Pat. 24. Ed. 1. m. 17.* A Writ was directed to the Sheriffs of *Lincoln, York and Northumberland*, to take up 100 Ships with a competent Number of Men; by all which it appears, that not only the Ports, but the Maritime Counties contributed to the Charge of the Defence; and this is hardly deny'd by the other side.

But nineteen In-
land Counties.

And it is plain it is for the Ease of these Counties to bring the Inland Counties in; nor is the Cause of that Consequence that is imagin'd; for of the fifty two Counties thirty three are Maritime Counties, and the Inland are but nineteen, and do not contribute above a 4th Part of the Charge for the Defence of the Kingdom.

Now, it is said, that the County of *Bucks* is an Inland County, where *Mr. Hambden* dwells, and therefore he ought not to be charg'd; but I shall shew that these also have been charg'd. Indeed, the Maritime Places receiving the greatest Benefit from the Sea by Exportation and Importation, and being better prepar'd against a sudden Invasion, the Writs have for the most Part gone to the Maritime Towns; but this is not a sufficient Reason, that they only who lie near the Danger, should be put to defend the whole Kingdom; for the greater the Strength and Safety of the Sea Coasts is, the greater is the Security of the Inland Counties; and therefore no Reason they should be totally discharg'd.

Inland Counties
send Forces to
the Defence of
the Coasts.

But to instance in some Records that charge the Inland Counties: *Claus. 48. Hen. 3. M. 2.* A Writ was directed to the Mayor and Bailiffs of *Beauford*, to provide Horse and Foot to march to the Sea Coasts to oppose an Invasion. *Claus. 48. Hen. 3.* A Writ to the Sheriff of *Huntington*, commanding the Men of that County to march to *London*, and from thence to the Sea Coasts for the Defence of the Kingdom. *Rot. 26. Ed. 1. M. 1.* Writs directed to the Sheriffs of *Hereford, Essex, Nottingham, Derby, Huntingdon, Cambridge, &c.* and almost to all the In-

land Counties *pro Custodia Maritima*. [Here several other Precedents of this Nature are cited.]

I come now to what has been said on the Defendant's Part: And first, for the Statute *de Tallagio non concedendo*; it is an Act of Parliament no question, but whether the Aid demanded by this Writ is within the Meaning of that Act is the Doubt; and I conceive it is not; for by the Words *no Aid*, 'tis agreed, the Aid *pur file Marrier, ou pur faire Fitz Chivalier* are not meant; and if by *no Talliage*, 'tis intended the King shall demand no Sum of Money, then you take away all Fines and Amerciaments, and all lawful Impositions due to the King, therefore this could not be the Intent of the Statute; but it was meant only to take away all Taxes and Talliages that were unlawful.

The 14 Ed. 3. (the second Parliament of that Year) seems to be the strongest Statute they have produc'd; for there the Commons grant the King a certain Sum of Money; and the King grants that this shall not be brought into Example, and that they shall not afterwards be tax'd without a Parliament *for the Defence of the Kingdom*: But still they don't show by any Act or Writ that has issu'd, that the King is to be charg'd with the Defence of the Kingdom. And suppose these Acts of Parliament and Petitions were as strong as they would make them, and that the whole Charge of the Defence were to lie upon the King, and not upon the Subject, in case of a sudden Invasion; yet if the Power at Sea was greater than the King was able to resist, must not you give way to the present Necessity, and assist him rather than the Kingdom should be lost?

The Subjects ought to assist in the Defence of the Kingdom in a Case of Necessity, tho' it were expressly against the Letter of a Statute.

And if you say Acts of Parliament must give way to Necessity, then you have answer'd all your Objections at once. And further, I shall offer these three Reasons why the Subject ought to be charg'd in this Case:

1. The Reason given in the Writ, *Quod omnes Tangit per omnes debet Supportari*.

2. As the King is intrusted with the Defence, it is fit he should have Means to do it; (and tho' it is said this might have been had in Parliament; if

an

an Enemy had come before any Aid had been granted, should the Safety of the Kingdom depend upon such a Contingency, the Kingdom may be lost in the mean time.)

No Parliament
call'd on the
Spanish Invasion
in 88.

3. Should the King be thus restrain'd in his Royal Power, it must make him contemptible both at Home and Abroad, and would encourage Foreign Nations to insult us; whereas on the contrary, we are only requir'd to part with a little Money, *secundum Statum & Facultates*, for our own Security. It has been objected, indeed, if the King can raise Money in this Manner, it may prevent the meeting of Parliaments; but there are many other Reasons for calling Parliaments, as the making good Laws, and redressing Grievances, &c. but to call a Parliament always upon engaging in a War is not necessary: When the Kingdom was in the greatest Danger, in 88, and the Rebellion in the North, no Parliament was call'd in either of those Dangers.

As to that Objection, That the King may pretend a Danger when there is none: I answer, if this Power be in the King, it is not to be taken from him, because he may misemploy it.

2. This Objection supposes Injustice in the King; and if the King be unruly, make what Laws you will, he will break through them.

3. If great Sums were levy'd, and the Money employ'd to another Use, there might be an Inconvenience; but here the Writ is expressly to make a Ship, and if they would have taken any Advantage upon that, they should have pleaded it; there does not appear any Money to be coming to his Majesty's Hands: It is said in the Writ, *We Will that no Part of the Money be converted to another Use than to the Building of a Ship.*

As to that Exception against the Sheriff, that he is an improper Person to tax the Subject *secundum Statum & Facultates*, I think him the fittest and most indifferent Man for that purpose; he has the Freeholders Names, and his Bailiffs know the Estates of most Men.

It hath been objected also, that the King could not levy this Money by *Scire Facias*; but I conceive
a *Scire*

a *Scire Facias* may issue for it. In *Fitz. Nat. Brev.* it is held the King may issue Writs for removing of common Grievances, and for repairing Bridges, &c. and why may he not issue Writs for the Defence of the Kingdom? *Clauſ. 1 Ri. 2. m. 7.* A Writ went to the Mayor and Bailiff of Oxford, to repair the Walls and Ditches of that Town; and why not to repair the Wooden Walls of the Kingdom?

But laſtly, 'Tis objected this ought to be *ſecundum legem & conſuetudinem Angliæ*, not by Writ, but in Parliament: To which I answer, that from King John's to Henry the 4th's Time these Writs were us'd, and then begun Tonnage and Poundage: That there is no Act for taking this Charge by Writ away; it was a general Custom, and a general Custom makes the Law of England; and we must try new Causes by the old Law, and compare this with what hath been done in former Times. I am perswaded in my Conscience there is imminent Danger, and there is a necessity this Danger should be prevented; and therefore I conceive the Proceedings legal, and that there is sufficient Cause to charge Mr. Hamlden with the 20^s. and that he ought to pay it.

Mr. Baron
Weston for the
King.

The Argument of Sir Francis Crawley, Knt. one of the Justices of the Court of Common Pleas, in the Case of Ship-money.

I conceive the Question to be, whether the King, by his Right of Sovereignty, may charge the Subjects in Case of Necessity to contribute with him to the Defence of the Kingdom, without their Consent in Parliament.

Sir Francis
Crawley's Argu-
ment.

This is the first Cause of the kind that ever came to Judgment; Kings do not use to suffer the Rights of Sovereignty to be debated at the Bar: The Subjects have indeed insisted, that they may bring Actions against the King's Officers for the Assessments made by Virtue of this Writ; but I find no Precedents of it but in the Abbot of *Robertbridge's Case*, 25 *Edw. 1.* who being tax'd in two Places,

Places, brought his Action to be discharg'd in one. In Cases of this Nature, it was usual to petition the Parliament for Redress; but now Actions are brought against the King's Officers in the King's Bench, the Common Pleas and this Court, and the King is pleas'd to bring this *Scire facias*, to the end this Case may receive a Determination at Law.

There have been some Things insisted on impertinent to the Matter, as first Tonnage and Pannage : Is there any such Grant on Record ? I wish it had been granted ; for he who takes away the Means of Preservation, is the Author of the Destruction : It is taken indeed, but you cannot tell by what Right. If this had been material, you wrong'd your Client you did not plead it ; and if it be nothing to the purpose, you wrong'd us and the Audience in taking up our time about it.

And you say Ship-money hath been charg'd three Years together ; Is this in the Record ?

'Tis said the King has impos'd great Sums on Merchandize : What is this to the purpose ? and to abuse the People, you talk much of the Subjects Property being taken away ; but I say, the King is the sole Judge of the Defence by Sea and Land, *Fitz. Nat. Br. fol. 113. Le Roy de droit Savior & Defensor son Realme al bien vers le Mer come vers les Enemies.*

In ordinary Cases, I shall admit that the sole Charge of the Defence belongs to the King ; he hath the Customs for Protection of the Merchants against Pirates and Enemies ; and in extraordinary Cases, the Charge of the Defence ought regularly to be supplied by Parliament, and cannot be done without it : The same Law, which requires the King to defend his People, tells us, we should grant him Aids towards this Defence.

The Statute *de Tallagio non concedendo*, no doubt, is a Statute, and the Words are, *Nullum Tallagium sine assensu Parliamenti*. And in the 14 *Ed. 3.* the King lays, He will impose no Charge, or Aid, on the Subjects, but in Parliament : But still if *Necessity*, and the Danger of the Commonwealth require it, and will not admit of the calling of a Parliament, the

the King in his Wisdom and Foresight may lay a Charge without their Consent, *Quod omnes tangit ab omnibus debet supportari*; and the King's Treasure being not sufficient, the other Rule succeeds, *Quod sentis Commodum sentire debet & onus*. I don't think the King is bound to pawn his Crown, or his Lands, tho' some Princes have been so courteous.

There is this Case in the 10th Report : One is bound by Prescription to maintain a Wall against the Sea ; yet in case of Necessity, and to prevent a publick Mischief, if he be not able to do it, the Charge being so excessive, he shall have Contribution ; the Law requires not Impossibilities ; so altho' the King be bound to defend the Kingdom by Sea and Land ; if the Charge be too great for him, and the Kingdom in danger of Ruin, the Subject ought to contribute to the Charge : If the Law makes such Provision, to prevent an Inundation in a small Level, a *fortiori* for the Commonwealth, in case of any great Emergency.

One bound to maintain a Sea Wall: If he be not able, the rest of the Level shall contribute;

And the whole Island being concern'd in the Event, the Charge ought to be borne by the inland Counties, as well as those which lie more immediately expos'd. If the Sea must defend the Land, why should not the Land contribute to the Defence of the Sea? And there are several Precedents where Writs have gone to the inland Counties for the Guard of the Sea, *Claus. 48 Hen. 3. 24 Ed. 1. 26 Ed. 3. &c.* Writs into *Berks, Oxon, &c.*

And to call a Parliament, and for the Senators to sit down in their Robes, *quando Hannibal ad Portas*, would be ridiculous, and an unnecessary Charge: This Kingdom hath been four times conquer'd; it concerns the King, the Head of the Commonwealth, to be circumspect, Conjectures and Probabilities are to be regarded: And if there were a violent Presumption of some potent Neighbour's preparing to come and invade us, is it not fit we should instantly prepare for our Defence? and there may be just Reasons of State why these things should not be reveal'd in Parliament, and so communicated to the Enemy.

The King in these Cases of Necessity, *Jure Gratia*, may change the Subject, without his Consent in Parliament, by Virtue of his Prerogative: The first

Regel

[Faint, illegible handwritten notes]

Regal Prerogative, and indeed which contains all the rest, is, *That the King may give Laws to his Subjects*; nor does it detract from him when he doth it in Parliament: His other Prerogatives are the Power of making War and Peace, creating Magistrates, pardoning Offences, coining Money, imposing Taxes, &c. *Comines, fol. 179.* says, If the Danger be at a Distance, the King cannot tax his Subjects without their Consent; but if it be near, calling some wise Persons to his Assistance, he may tax them. *Bodinus, lib. 1. cap. 47.* says, Where the Danger is imminent, the King ought not to expect a Parliament, but is to raise Money suddenly; and such Impositions on the Subject are just and necessary: These are the Opinions of those who wrote not according to the Law of any one Kingdom, but the Law of Reason.

But 'tis objected the King may levy Money on Pretence of Danger, when there is none; but I cannot think so of so just and pious a King. Besides, it is not to be suppos'd he would charge himself, as well as his Subjects, to no purpose; the Money is employ'd for the Defence of the Kingdom, together with the King's own Money: And to say, in a time of extraordinary Danger, every Man shall be his own Carver, and do what he pleases, is ridiculous.

It is said further, If the King may charge 20 s. on Mr. *Hambden* this Year, he may charge 20 l. the next. This is an unhandsome Suggestion; You magnify Parliaments, and with good Reason; but let us not think dishonourably of Kings.

I shall mention but two of the Precedents that have been produc'd by the Defendant; and the first is *Rot. Parl. 2 R. 2. part 1.* A great Council of Peers was call'd to consider of the Defence of the Kingdom, and nothing being found in the Treasury, they say they know no Remedy but a Parliament; and a Parliament is call'd, and in the mean time they lend the King Money, and he gives Security to repay it.

It is to be consider'd this was a very troublesome Time, and the King an Infant; so that nothing can be concluded from hence, tho' it has been much insisted on.

Rot.

Rot. Parl. 2 Hen. 4. M. 22. A Commission issued for providing Barges; and the Commons petition'd against it, and the King recalls his Commission: He says he will advise with his Lords for the future. Is this a Disclaimer of his Right? Besides, this King was but an Usurper.

Many Precedents have been alledg'd both before and since the Conquest; that of *Danegelt* was a heavy Yoke; but necessary; whether it was granted by Parliament or not, *non constat*: I hold it to be a good Precedent, and good without a Parliament. Some distress'd Kings indeed, as King John, Hen. 2. and Rich. 2. 'tis true, did borrow what they might have took of Right.

I answer further, As to the Statutes of 25 Ed. 1. and 14 Ed. 3. and the Petition of Right the 3 Car. that were there an express Statute that the King should not have Aid of his Subjects but in Parliament, were the Kingdom in never so much Danger; I say *this would be a void Act*, such an Act were manifestly unreasonable, and ought not to be suffer'd: To follow the Words of the Law, says the Doctor and Student, would in some Cases be the greatest Injustice. The Laws of God and Reason are an implied Exception, such an Exception is understood in every general Law: But this Right of Imposition without Parliament appertains originally to the King, if he be a Sovereign, in right of his Crown: You cannot have a King without these royal Rights, *no not by Act of Parliament*. Again, There can be no general Law but will have some excepted Cases attending it: If a Law were made that none should open the Gates of the City till the rising of the Sun, yet should the Citizens be drove by an Enemy to the Gates before the Hour, would it be an Offence to open the Gates? In *Edward the 3d's* time, none might relieve a sturdy Beggar on Pain of Imprisonment; yet, if in the Extremity of Winter a Man should give him Cloaths to preserve his Life, he would not come within that Statute: By such an Exception of the Law of Reason is this Power reserv'd to the King, *Nemo tenetur ad impossibile*.

An Act of Parliament, that the King should not charge the Subject in a Case of Necessity, would be void.

In every Law some excepted Cases are understood.

The Word *Salus* in the *Mittimus* is said to be metaphorical, but it is well enough: In the Writ of *Oyer and Terminer* the Words are, *Omnes qui habent damnum vel salvationem*. But I conceive the Writ of the 4th of *August*, without this, contains sufficient Matter for this great Preparation; it says, *Left we should lose the Dominion of the Sea*; and is not that a good Reason, to prevent others becoming Masters at Sea? Then 'tis said, *Consideratis etiam periculis, &c.* The Danger is so evident and so great in these warlike Times, that a Force is necessary both by Sea and Land. You have by your Demurrer confess'd the Kingdom to be in Danger both by Sea and Land, and that the Danger is present, imminent and instant, and greater than the King, without the Aid of his Subjects, can resist. Shall we then attend the Delays in Parliament? no; Let us resort to our pious King, whose Prerogative and Right of Sovereignty 'tis to defend the Realm, and maintain his Subjects Liberties. I give Judgment for the King.

Mr. J. Crawley
for the King.

The Argument of Sir Robert Berkley, Knt. one of the Justices of the Court of King's Bench in the Exchequer-Chamber, in the Case of Ship-money, 10th February, 13 Car. 1637.

Sir Robert Berkley's
Argument.

Sir Robert Berkley: The Defendant having had *Oyer* of the several Writs and Records in this Proceeding, has demurred generally, without the common, or any other Protestation: The Words of the Demurrer are, *That materia contenta* (in these Records) *minus sufficiens in lege existit ad ipsum onerand'*: He does not say that the Matter is *minus vera*; but acknowledging the Matter to be true, he puts it upon the Sufficiency or Insufficiency in Point of Law to charge him; whereupon Mr. Attorney has join'd in Demurrer.

Having consider'd the Matter with great Deliberation, I am satisfy'd my self, and I hope I shall satisfy others, that as this Case stands, the Charge impos'd is good in Law, and consequently that Judgment ought to be given against Mr. Hambden, *Quod oneretur*.

I shall

I shall in the first Place state the Case, and settle the proper Question. I admit that the King cannot at all Times, and upon all Occasions, charge the Subject without Consent in Parliament; we are Freemen, not Slaves or Villains; to be tax'd *de alto & basso*; altho' this be a Monarchy, and the King hath *Jura summae Majestatis*, his Government must be *secundum leges Regni*; and by those Laws the Subjects are not Tenants at Will of what they have: They have a Property in their Goods, and a Birth-right in the Laws of the Kingdom; these Laws cannot be alter'd or abrogated, nor others made without Consent in Parliament. I premise this, to prevent Misapprehensions, or false Reports.

Mr. Hambden's Council have produc'd a Multitude of Records in Cases of ordinary Defence, which I shall pass over as little to the purpose; and even that ancient Tribute of *Danegelt*, which they mention, tho' it comes nearer than any of those Cases, differs very much from the Charge impos'd here: They say that *Danegelt* was impos'd by Parliament, that it was releas'd by Edward the Confessor; and 'tis so long since it was collected, we scarce know what it was.

I answer, It is a bare Conjecture that *Danegelt* was created by Parliament; for the Words, *Statutum est*, which they rely upon, do not imply a common Consent in Parliament, but only the regal Authority, or at most that it was done by the King and his great Lords.

As to *Danegelt* being releas'd by Edward the Confessor, I answer with Sir Henry Spelman, there were two kinds of *Danegelt*; one *ad pacandos Danos*, another *ad arcendos Danos*. The first the Confessor might release, there being no occasion for it in his Time; but the *Danegelt ad arcendos*, &c. could not be releas'd, for it appears in *Tilburienfis* that *Danegeldum sub indignis Raybus solvebatur usque ad tempus Willielmi primi*: It appears also in *Leges H. 1. c. 16.* that *Danegelt* was paid in that King's time. And it was paid till King Stephen's time, 'tis plain, by his releasing of it; tho' as to the Validity of such a Release by a Usurper, so as to bind the Crown, if it were granted by Parliament; see 9 Ed. 4. 2.

'Tis true, it seems uncertain how much this *Danegelt* was; by the Precedents there was sometimes 1 s. sometimes 2 s. and sometimes 4 s. impos'd for every Hide; and I believe it was more or less, as occasion requir'd; which to me is a Proof that it was not impos'd by Act of Parliament, for then it could not have been rais'd.

It is generally agreed that this *Danegelt* began in the Reign of King *Ethelred*, who was so imprudent to let the *Danes* make themselves Masters of several Places before he prepar'd for a Defence, and thereupon was call'd *Ethelred the Unready*: But we, who enjoy such Peace by his Majesty's provident Care, may very well give him the Title of *Charles the ready*, or *Charles the provident*.

But *Danegelt* differs from the present Charge in several Instances; that was annual, this only in case of Necessity; that was collected by Hides of Land, this out of the personal, as well as real Estate; that was a Tribute of Money, this of Shipping and Armour in kind; that was against Pirates, this for the common Defence of Sea and Land: In that the Clergy were originally exempted, but this Charge is general upon all, without Exception.

Aids, Prises,
Mises, Taxes,
and Talliages,
defin'd.

I come now to shew that the Charge now demanded is not within the ancient Acceptation of the Words *Aids*, *Mises*, *Prises*, *Taxes*, or *Talliages*, or of the Word *Subsidy*; these, 'tis agreed, cannot be levy'd without Consent in Parliament.

Aids were of two kinds; 1. Such as were *Aids* and *Services* too, as *pur faire fitz Chevalier*, *pur faire marrier*: These *Aids* common Persons had, who had Signiories, as well as the King, and therefore no Colour for comprehending these *Aids* under the Word *Aids*.

The second sort of *Aids* are Sums granted to the King for building Bridges, &c. for his Wars, or sometimes to be dispos'd of at his Pleasure; as *Rot. Parl. 25 Ed. 3. n. 12.*

Mises were Presents made to the King in kind, at his coming to the Crown, and these are yielded in *Wales*, at this Day, to a Prince of *Wales*.

Prises were part of the Subjects Goods taken from them to the King's Use without pay, hence comes Prillage of Wines.

Taxes & Tallages sont dismes quinzim, ou autre Subside, grant per Parliament.

I admit the present Case is not to be taken so, that unless the Sums charg'd are rais'd, immediate Ruin and Destruction to the Kingdom will certainly ensue, for then every thing would be lawful that might tend to prevent it.

Nor is the principal Thing in the Writ a Command to levy Money, but to provide a Ship; and the refusing to pay this Duty, is in effect a Refusal to obey the principal Thing commanded, *Qui negat medium, destruit finem*. Now this concerning the Safety of the Commonwealth, the King, as Head and Sovereign thereof, has, incident to his Regal Office, a Power of Coercion, and may enforce those, who refuse their Quota, to pay it; so that tho' the *Senae Fac.* against Mr. Hamdden be in the King's Name, it is not to have Execution as for the King's Money, or for a Debt due to the King, but to bring on a declaratory Payment, that Mr. Hamdden ought *onerari* 20^s. towards providing a Ship for the County of Bucks.

Having shewn what our Case is now, I come now to state what it is, And in short, the State of our Case is thus:

Dominium maris & salus reipublice periclitabatur, convulsi Regi & Subdito, omni qua poterint festinatione, accelerare ad defensionem Regni, nutritionem maris, & securitatem subditorum.

And whether to prevent the Ruin and Destruction of the Commonwealth, the King may not by his own Authority, without Consent of Parliament, impose a Charge on his Subjects in general to provide such Shipping, as he in his Judgment sees necessary, to join with his Majesty's own Ships, and attend them as long as his Majesty shall think fit; and also to command them to be at the Expences, *sunt in Victualibus, quam hominum Salaris, & aliis ad guerram necessariis*, is the Question.

It is a dangerous Tenet, that the Weal Publick ought to be expos'd to utter Ruin, rather than such

a Charge as this should be impos'd by the King for its Security. The Jews, indeed, would not use Means for their Defence upon the Sabbath, and their Enemies taking advantage of it, ruin'd their State. And is it not highly probable if this Doctrine be establish'd, ours will soon be brought to a final Period, to Destruction and Desolation?

In my second general Head, I shall consider the Fundamental Policy, Maxims, and Rules of Law for the Government of this Realm.

And first, it is plain that this Government was originally Monarchical, and the Rights of Monarchy appertain to his Majesty: Mr. Holborne is mistaken, when he says, the King can take nothing of the Subject but by Consent in Parliament. There are two Maxims which disprove Mr. Holborne's suppos'd Policy; The first is, *That the King is a Person trusted with the State of the Commonwealth*; the second, *That the King can do no Wrong*; upon these Maxims the *Jura summe Majestatis* are grounded.

To no purpose to trust the King with our Protection, unless we allow him the Means of protecting us.

It is agreed, that the King by his Regal Office is bound to defend his People against Foreign Enemies, *Fitz. Na. Br. fol. 118. Est a entendre que le Roy doit de droit sayer & defender son Realme cybien vers le mere, come vers Enemies.* *Bracton* and *Glanville* in the Front of their Books say, that the King must have Arms as well as Laws; Forces against Foreign Enemies, Laws for doing Justice at Home; and if he must have these, surely he should not want the necessary Means, or be dependent *ex aliorum Arbitrio*; for it is a Rule in Law, *quando quis aliquid alicui concedit, concedit & id sine quo res ipsa esse non potest.*

I hold further, that the King of mere Right ought to have, and the People are in Duty bound to yield him Supplies for the Defence of the Kingdom; and when the Parliament grant what is commonly call'd a Benevolence, they do but an Act of Justice and Duty to the King in case of the necessary Defence of the Kingdom. 19 H. 6. 64. *B. Hody* Chief Baron, *Le Roy est Inherite, &c.* that is, he hath Right of Inheritance to have Fifteenths in his Court of Parliament; for the same Law which obliges the King to defend his People, wills also, that the

Peo-

People contribute to him of their Goods in Aid of their Defence.

And in this Case, the Kingdom wanting a present Provision for its necessary Defence, and it would be dangerous to stay for a Supply in Parliament, the Duty is not therefore lost for want of Time to observe the Form. Indeed, if this was not a Duty *termini*, but only a meer Benevolence, then it could not by Law be exacted, without that essential Part, the Subjects Consent in Parliament.

I acknowledge the Parliament to be *Commune Concilium Regis & Regni*, the most honourable and supreme Court of the Kingdom; but still it is but a *Concilium*, the King may Call, Prorogue or Dissolve it at his Pleasure; and what the King does herein, is to be look'd upon as just and necessary.

Besides, Great Bodies move slowly, and sudden Dispatch is not expected from them; and tho' Parliaments cannot err, particular Members may, and some of them may have sinister Ends, and create Delays and Disturbances, (I wish late Experience did not verify these Speculations) Parliaments themselves have sometimes been censur'd too, as *Parlamentum Indolentium*, &c.

And this Point of *Retentio Dominijs maris* is of weighty Consideration; in this, not only the *bonum esse*, but the *esse* of the Commonwealth consists, and therefore it behoves the Subject *accelerare* to the Tuition of it: *Salus Reipublice suprema lex*, particular Interests are not to be consider'd where the publick Welfare is at Stake, 8 Ed. 4. 36. And if there be not *salus Reipublice* in our Case, there is at least *bonum publicum*; and even in this Case the Subjects are bound to consent, 44 Ed. 3. 19. 5 Coke 63. 10 Co. 139. And in the Case of the new erected Office for measuring Cloths, *Gascoigne* the Chief Justice holds, That the King may charge his People, without their Assent, to a thing which may be for their Profit, and this Case is cited and allow'd 11 Co. 86. b.

I observe further, That tho' there have been many of these Writs in the Reigns of several Kings, there never was before an Action brought for any thing done upon them, saving in the Abbot of *Robertbridge's*

The King may charge his Subjects *pro bono publico*.

bertbridge's Case; and there 'tis confess'd in the Pleadings, that the Agisting Mens Lands and Tenements to contribute *ad custodiam maris*, by the King's sole Command, was good in Law.

Lastly, It is remarkable, whenever a Charge hath been impos'd without Consent of Parliament in a Case of Necessity, there is not one Instance, wherein ever any King acknowledged such Charge was against the Laws, or the Liberty of the Subject; and it is not the Representation of the Subject without the Concurrence of the Sovereign that can make a Precedent in this Case; and there are a Multitude of Precedents, where, in Cases of Necessity, private Men's Ships have been taken into the Service, and Commands for Apparelling of Soldiers, Victualling and Conducting them *propriis sumptibus*; and Writs have been directed to the Sheriffs and head Officers, that they should *levare facere expensas de Comitatus*, or *Villarum*, as the Case was.

I conclude, that when the Good and Safety of the Kingdom in general is concern'd, the King may, under his Great Seal, command all his Subjects to provide and furnish Ships at their Charges for the Defence of the Realm, and may by Law compel the doing thereof; and that the King is sole Judge of the Danger, and when and how it is to be prevented; and to this many more as well as myself have subscrib'd.

I come now to my third general Head, namely to consider the Statutes, Petitions and Answers which concern this Case: And first, as to *St. Edward's* Laws that have been cited, they have, indeed, *Danegelt* mention'd in them, but nothing else pertinent to the Matter, save that the People are free, and have Liberties and Customs belonging to them of Right, which is not denied. In the *Magna Charta* of *Hen. 1.* 'tis said, *Milites possiderent Terras dominicarum suarum quietas ab omnibus Geldis* (Sums of Money) and yet it appears by his Laws, that *Danegelt* was to be paid under a certain Pain.

As to the *Magna Charta* of King *John*, cited by Mr. *Hambden's* Council, it was no Statute, nor ever was confirm'd, as the *Magna Charta* of *Hen. 3.* was; but it is to be observ'd, even in that, after the Words

nullum

nullo auxilio; it follows, *nisi ad Corpus nostrum redimendum*; and if for that, much more for redeeming the Body of the Commonwealth, as in our Case.

And for the *Magna Charta* 5 Hen. 3. tho' it allow'd all the Liberties the Subjects could then claim, it has no special Words pertinent to our Question; tho' such Charges for the Defence of the Kingdom out of Parliament were frequent, both before and at that Time; and in that very Statute there is this Clause, (*Et si nos adduxerimus vel miserimus, cum in exercitum, &c.*) which shews the King's Right of disposing the Bodies of his Subjects in his Armies.

In the Statute *de Tallagio non concedendo*, the Words are general also, for the better understanding whereof, the Occasion of making it must be consider'd. *Ed. 1.* was engag'd in great Wars in Flanders, France, Wales and Scotland; which reducing him to some Straits, he caus'd a Scrutiny to be made who had Money in their Hands, and the King's Ministers took it wherever they found it, against the Peoples Consents, but as borrow'd for the King's Use; and the Religious Houses being principally plunder'd, they incens'd the Great Men against him, particularly the Constable and Marshal of England, *Robert* and *Bigot*, who stood out against the King; and being much distress'd, he yielded to pass this Act, without any Exception, or saving of the Ancient Aids: But 'tis plain, these general Words were never intended to extend to every Case; for the Aids *pur faire fitz Chivalier*, & *pur file Marrier* still continued, as did the King's Power to array and send Soldiers *sumptibus Villarum & Comitatum* into remote Parts of the Kingdom, as appears by the constant Practice afterwards in this, and the succeeding Reigns.

Next was urg'd the 14 *Ed. 3.* and the Petition of Right, 3 *Car.* much to the same Effect; but I observe that in none of these Statutes is there any express Clause, that no Charge shall be impos'd for necessary Defence without common Consent: And if such a Clause had been offer'd, besides that I doubt if it would have been of any Force, I question whether any of the above-mention'd Kings would

The Occasion
of the making
the Statute *de
Tallagio non
concedendo.*

No Law can be
suppos'd to in-
tend the Ruin
of the Common-
wealth.

would have yielded to so dishonourable and unjust an Expression.

But all these Statutes being general, must have a reasonable and equitable Exposition: The Defence of the Kingdom, and *Salus Reipublicæ* must be understood to be clean out of those Laws, otherwise the Laws that were made for the Good of the Commonwealth might prove the Ruin of it.

Mr. Hambden's Council have also cited several Statutes, particularly the Statute of Winchester, 13 Ed. 1. c. 6. to prove that no Soldiers should be compell'd to march out of their proper Counties without Wages: But I find, *Ror. Parl.* 5 Hen. 4. N^o. 24. there having been Commissions directed to the Gentlemen of the Country, for the arraying, arming, and conducting Soldiers to the Sea Coasts, and many Pains and Forfeitures compriz'd in those Commissions; the Commons complain'd of some things as Grievances, and having obliterated several Clauses, they pray'd the King that no Commissions of Array should issue for the future, without such Amendments as they had made to it, which was agreed to by the King, and the Copy was enroll'd; and it appears by the Precedent on the Roll, that fifteen Gentlemen of this County of Bucks were Commissioners, among whom was one Hambden, probably an Ancestor of the Defendant's.

In this Roll there being a Recital of some Ravages made by the Enemy, to resist them if they should return, *ac pro salvatione & defensione Regni & Ligeorum*, the King assign'd Commissioners *ad armandum & triandum omnes homines ad arma, & ad armari faciendum omnes illos qui de corpore sunt potentes, qui de suo proprio non habent unde seipsos armare possint, (viz.) quilibet eorum juxta statum & facultates suas, & ad distringendum omnes illos qui in terris & bonis sunt potentes, & pro debilitate Corporis impotentes ad inveniendum armatos pro illis qui non sunt habiles.* And the Commission directs further, *Conducere eos tam ad Costeram maris, quam al' loc. ubi & quoties necesse fuerit: Et ad Arrestandum & Capiendum omnes qui fuerint Rebelles seu contrarii & Prisonæ committendum ibidem moraturi quousque pro eor' punitione aliter auxerimus Ordinandum, &c.*

This

This Commission, I observe, was offer'd by the Commons themselves in Parliament, immediately after the Confirmation of Edward the 3d's Laws, by the Advice of all the Judges: And as Arms and Marches by Land are necessary for the Defence of the Land, so Ships and Sailing, Ord'nance and Tackling, and the other Necessaries specified in the Shipping Writ, are necessary for the Defence of the Sea.

I shall now endeavour, to answer those Objections that have been made by Mr. Hambden's Council: It is said that in this Case the King doth not proceed *per Justiciarios*, but *per se*, or *in Camera*; it is illegal.

I answer, Here is nothing done *in Camera*: The Shipping Writ issues out of Chancery, and besides, we are not now assessing a Fine, as was the Case 2 Rich. 3. fol. 10. 11.

'Tis true, where Judgment of a Fine is to be given upon an Indictment, &c. this cannot be assess'd by the King *in Camera*, but by the King's Justices *in Curia*.

But in many Cases the King hath *potestatem absolutam*; a Man may be committed *per speciale preceptum Domini Regis*, and is notailable, Westm. 1. The King is *Capitaneus Justiciarius Anglie*, 20. Hen. 7. However, this Distinction of *Curia* and *Camera* is not rightly applied to this Case, for the Question here is, What is the King's Power in case of necessary Defence?

2. 'Tis objected that divers Payments, and Promises of Payment have been made by several Kings for Provisions for Defence of the Realm at Sea.

I answer, That it appears by the Records that many more Payments have been made by the Subject in like Cases; and besides, those Promises of the King were of Courtesy and Grace, and are not binding in Precedent no more than in the Case of Mines Royal: It appears that many Subjects, Owners of Lands where Silver Mines were, have shar'd the Profit with the King, and this was objected to the King's sole Interest; but it was adjudg'd notwithstanding, that it was of the King's Courtesy and Grace, and not of Right; one may do what he pleases with his own.

3. Dis-

3. Disusage hath been objected; but a Law diffus'd may be put in use; *Nullo tempore occurrit Regi*; besides, Supplies have been had from time to time, sometimes in Parliament, and sometimes out of Parliament, tho' not in this particular Way.

4. It has been said that the Tenures, Customs, and other Profits vested in the Crown, are sufficient for the Defence; but it has been shewn by my Brother *Weston* how very short and insufficient these are.

5. It is objected that this is an inland County, who neither understand the building of Ships, or if they did, have no Means of sending them to the Sea, nor have they Mariners Tackling, or other Necessaries, &c. so that an impossible, or at least an improper Charge is put upon them, and the *Cinque Ports* and maritime Places are much better prepar'd for this Service.

The whole Kingdom but one Body; and in Cases of publick Danger, the Distinction of inland and maritime Counties ridiculous.

I answer, The inland Counties may with their Money provide whatever they want: *Nomius mensura rerum*; and there is great Reason he should join in the Defence, *qui sentit Commodum*. Besides, the whole Kingdom is but one Body; King *Alfred* first divided it into Counties, and the King may make a County *de novo*, but take the whole as one Body; if one Member suffer, all the Members suffer with it; and if any were to be excus'd, it seems more reasonable to excuse the maritime Places, who skreen the rest from Danger, and lie always expos'd to the Enemy's Insults: And further, It appears from several Precedents cited, that it is no new thing to charge the inland Counties to this Service. In the Case of an Inundation, all within the Level are to contribute; and in the Case of *Rippon* in *Yorkshire*, all who had Salvation by the Plaintiff's being Hostages to the Scots, were compell'd to bear their Proportion towards their Ransom; and the same Reason holds in this Case.

6. 'Tis objected that this Method occasions Murmurings and Discontents among the People; but I answer, The Loss of the Kingdom would be a greater Evil.

7. 'Tis said there is Cause to think the Charge may become annual, it having continu'd three Years:

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I answer, If the Necessity continues, the Charge must continue; that this is to be left to his Majesty's Justice; and it is not to be suppos'd he will abuse his Power.

8. It is said, If there were *flagrans bellum*, *Hannibal ad portas*, then indeed this Course would not be illegal; but here is nothing like this.

But let us consider the Reason why it is not against the Law in that Case; it is because it prevents a greater Mischief: The Reason is the same here; in such Times as these it must be acknowledged that Security is dangerous.

9. It is objected that Tonnage and Poundage, that us'd to be granted for these Occasions, is taken *de facto* by the King, without a Grant.

I answer by the Stat. *Jac.* it is confess'd that Tonnage and Poundage has been paid to our Kings Time out of Mind; and they say further, that it is not sufficient for the Purposes for which it is commonly granted; and then the rest must be supply'd another Way: And as to what is suggested, that Tonnage is not taken *de jure*, it is to be observ'd that upon the Demise of the King that Duty was always taken by the Successor, till it was regranted by Parliament.

The King always takes Tonnage and Poundage on his Accession, till it is granted by Parliament.

10. As to that Objection, that a Parliament might have been holden before the Writ was returnable; it is true, a Parliament might have given the Supplies in that time, but it would have taken a longer Time to prepare what was necessary afterwards; and so the whole Year might have been lost.

11. It is said the King furnis'd Danger when there was none: I answer, The Law believes what the King affirms; and further, Mr. *Hambden* by his Demurrer has confess'd the Danger.

12. Objection, 26 Ed. 1. Pat. Rol. M. 21. 'Tis said the King issued a Commission to enquire into Grievances of this Nature: I answer, the King promises here a Repayment only of what had been taken without Warrant; but as to the rest, he says, *Le Roy fera tant que ils se tiendront apaisés par raison*, which I conceive is no more than that the King would give them a reasonable Answer.

13. Object. That the Words in ancient Writs are no more than *requiramus & rogamus*: I answer, The Word

Word *Rogamus* signifies as well a Command as a Prayer, *Cum Princeps orat, precibus præcepta colorat*. Besides, let them read further, and they will find those Writs make directly for the King; for they say, *Vos effectuose requirimus & rogamus, quatenus ad premissa considerationem debitam habentes*: They instantly array 500 Footmen, and send them to the King, *sumptibus suis*.

14. Obj. *Reginald, de Grey* being commanded by the King's Letter to levy 1000 Men at *Bromfield*, and march with them to *Yale*, answers, He dare not levy the Men without Warrant, and could not march without Pay: I answer, This was but his Judgment; it does not determine the Right, and perhaps he thought the King's Letter without the Great or Privy Seal not to be a sufficient Warrant; nor is it any extraordinary thing for Soldiers to refuse to march without Pay.

15. Obj. That Money borrow'd by the King was commanded to be repaid, (*Ut Conscientia Regis exoneretur*): I answer, This was the 19. Ed. 1. who had taken of the Abbess and Convent of *Canonliegbe* 612. l. and promis'd her Repayment. Indeed it was a usual thing in those Times for our Kings to make a Scrutiny into the Treasure of the Religious, and when they were in any Straits, to take their Plate, or rich Offerings, to supply their Wants; and no Wonder the Religious continued to press it upon the King's Conscience till they had Restitution.

16. Obj. That the King moves the Archbishop to pray for him, &c. 2 Ed. 3. The Record it self best shews how that Matter was: *Pater, &c. Cum populus regni variis oneribus, tallagiis, & impositionibus hactenus gravetur, quod dolentes referimus, sed inevitabili necessitate compulsi, de eisdem oneribus ipsum relevare non valemus*; the King desires the Archbishop to move the People, *ut tantam necessitatem humiliter, benigne, patienter, & charitative sustineant*; and they would have a good Opinion of the King, and would pray, and give Indulgences, to the end he might prosper in his Wars, for Recovery of his Right in *France*.

17. Obj. The *Parl. Rol.* 13 Ed. 3. M. 9. & 11. The Commons pray they may not be put to advise about the Guard of the Sea, that belonging to the Ports:

Ports: I answer, That they do not put the Charge upon the King, and of what Strength the Ports might be then, I know not; but at present they are not able to defend the Seas, and therefore the Defence must fall upon the whole Realm.

18. Obj. That the great Council of Peers, 2 R. 2. declare they cannot charge the Commons without Consent in Parliament, even in a Case of Necessity. This is the strongest Authority that has been produc'd for Mr. Hambden: But I answer, The King was then in his Minority, and the Power of an Infant King was not settled till Ed. 6. Besides, the Words are, that the Lords cou'd not advise, or find any Means, and 'tis certain none but the King himself could command in such a Matter, and he was hardly out of his Nurse's Arms: The Nation was then also full of Discontents: And lastly, the Danger was provided for another Way, viz. by lending; but had it not, the People ought to have been charg'd without, and even against their Consent, in a Case of that Necessity; the Kingdom must not be lost.

19. Obj. That the 2 H. 4. Barges, or Ballangers, being commanded to be made without Consent in Parliament; the King, on a Representation of the Commons, recall'd the Commission: I answer, It appears that those Commissions issued in the Reign of R. 2. and so were void of themselves, for all Commissions determine with the King's Life: But further, Henry IV. says, Considering the great Necessity he had of those Vessels, he would advise with the Lords about them, so that this is no more than a *Roy avisera*; and at last we have known Matters complain'd of in Parliament, that have in Reality been no Grievances.

20. Obj. That in 7 Ed. 4. the King in his Speech to the Parliament tells them, *He will live of his own*; but he goes on, *And not charge my Subjects but in great and urgent Causes, in Defence of the Realm, as has been done by my Progenitors in time of Need*; which he did sometimes in, and sometimes out of Parliament.

The last considerable Objection is the Authority of Fortescue de Laudibus Legum Angliæ; where he says, The King is *Rex politice Regens*, and not *Regulariter*, to

M. J. Berkley
for the King.

do what he pleases. This I agree, *regulariter* he is not ; but Cases of *Bonum publicum*, *Salus Reipublicæ*, and Cases of Necessity, are not to be compriz'd within ordinary Rules ; every Subject must in these Cases, even by the Rules of Law, set to his helping Hand, and contribute his best Abilities. Therefore I conclude, that upon the Reasons and Authorities cited, the 20 s. impos'd upon Mr. Hambden towards providing a Ship is consonant to Law, and consequently Judgment ought to be given against him, *quod oneretur*.

Sir George Vernon
for the King.

Sir George Vernon, Knt, one of the Justices of the Common Pleas, desir'd a Week's time longer to deliver his Opinion, not having had Opportunity of examining the Records, by reason of his ill State of Health. But the Court answer'd, The Days having been already appointed peremptorily for their Arguments, a further time could not be given : Whereupon he said, He held that the King, *pro Bono publico*, might charge his Subjects for the Defence of the Kingdom, and that a Statute derogatory to the Prerogative would not bind the King ; he might in Cases of Necessity dispense with any Law : And therefore concluded for the King.

Sir Tho. Trevor
for the King.

Sir Thomas Trevor, one of the Barons of the Exchequer, also deliver'd his Opinion, that Mr. Hambden ought to be charg'd with the 20 s. assess'd on him ; but his Argument is wanting.

The Argument of Sir George Crooke, Knt. one of the Justices of the Court of King's Bench, in the Case of Ship-money.

Sir George Crooke's Argument.

Sir George Crooke : This is a Case of the greatest Weight that ever was argued by Judges in this Place. On the one Side it concerns his Majesty in his Prerogative and royal Power, and on the other Side it concerns all the King's Subjects in their Liberties and Estates ; which has occasion'd some of us to move that his Majesty would please to have it determin'd in the great Council of the Realm, and not by us only, who are accounted his Majesty's Council at Law ; but since his Majesty is pleas'd it should

should be debated and determin'd here, we must obey his Pleasure. I confess I have been much distracted with so many learned Arguments at the Bar, and so many Records and Precedents cited on either Side; but the Council possibly may be prejudic'd in their Opinions: I my self, when at the Bar, have argued confidently, and as I then thought with the Law on my Side. But afterwards being upon the Bench, and weighing things indifferently, have alter'd my Opinion; therefore I am much so much mov'd with what the Council have advanc'd, as with the Objections and Arguments of my Brothers, who have argued before me. This makes me most distrust my own Judgment. They have all argu'd one Way, and I should willingly have concurr'd with them, if I could have satisfy'd my Judgment with their Reasons; but I must not go with a Multitude against my Conscience. I shall therefore give my Reasons, and submit my self to the Judgment of my Lords and the rest of my Brethren; and do not declare it to be my Opinion; that as this Case is, Judgment ought to be given for the Defendant.

Before I proceed to the Argument, I would remove two Difficulties:

1. It is said that by the Demurrer the Danger of the Kingdom is confess'd, and so it is admitted to be a Case of Necessity: To which I answer, That the Matters of Fact are not confess'd by a Demurrer; but where the Matter precedent is sufficiently pleaded or laid down; 3 Co. fo. 96. *Burton's Case*.

2. It is urg'd, that this Case has been resolv'd under all our Hands.

I answer, I have given my Opinion under my Hand to two Cases: To the first voluntarily in December, 1635. viz.

I am of Opinion, that where the Good and Safety of the Kingdom in general is concern'd, and the whole Kingdom is in Danger, of which his Majesty is the only Judge, there the Charge of Defence ought to be borne by all in general.

This I shall always maintain; for when the Kingdom is in Danger, the King may command every Man in the Nation with all his Force to come and defend it at all Times, and in all Places in the

The King may command every Man to assist in Person in the Defence of the Kingdom.

Kingdom; and if any one refuse Obedience, he is finable and punishable.

The second Opinion was February, 1636. viz. When the Good and Safety of the Kingdom in general is concern'd, and the whole Kingdom in Danger, his Majesty may by Writ under the great Seal command the Subjects of this Kingdom, at their own Charges, to provide and furnish such Number of Ships, with Men, Victuals and Ammunition, and for such time as his Majesty shall think fit, for the Defence and Safeguard of the Kingdom from such Danger. And that his Majesty may compel the doing thereof, in case of Refusal and Refractoriness. And that in this Case his Majesty is sole Judge of the Danger, and when and how the same is to be prevented and avoided.

I confess I subscrib'd this Opinion with the rest of the Judges. But I then dissented in Opinion, and signified that I conceiv'd such a Charge could not be laid but by Parliament, in which another of my Brothers agreed with me, and four others dissented in some Particulars to what was subscrib'd. But the greater Part seeming resolv'd upon this Opinion, and some of them affirming they had seen the Records and Precedents of such Writs, whereby their Judgments were satisfied, and it being said to be usual for the lesser Number to subscribe, where there was a Difference; as in our Courts, the two Judges in five dissent, Judgment is enter'd *per Curiam*: And so in Cases of Certificates, where the major Part agree, the rest are to submit and subscribe; and it being agreed that this Subscription would not bind us, if the Case should afterwards come judicially before us, and it being assur'd us that his Majesty should be acquainted which of us dissented; upon these Considerations I did consent to subscribe. But this being before I had heard any Argument, or seen any Precedents; I hold that none are bound by that Opinion. And if I had been of that Opinion, yet upon better Advice I think it no Shame to retract it for *humanum est errare*.

No Precedent of an inland County being commanded to provide a Ship before.

I proceed now to shew that this Writ of the 4th of August is against the Common Law; 'tis the first Writ since the Conquest that ever went to an inland County

County to prepare a Ship, with Men and Ammunition, for ought appears by any Record: And where there is no Precedent, according to *Littleton*, fol. 23. the Law will not allow any such Writ.

2. By the Law of *England* the Subject is free in his Person, and has such a Property in his Goods and Estate, that he cannot be depriv'd of them, but by common Consent in Parliament: the Law distinguishes between Bondmen, who hold their Estates at their Lord's Will, and Fræemen, whose Property cannot be invaded, or charg'd, but by their own Consent; 8 Co. fol. 92. *Francis's Case*. *Matt. Paris*, fol. 245. *Fortescue de Laudibus Legum Angliæ*, cap. 9. fol. 25. &c.

And by the Book Case, 13 Hen. 4. fol. 14. it appears that a Grant by the King, which tends to the Charge and Prejudice of his People, is not good: But 'tis agreed that Grants of Tolls, of Fairs, of Pontage, Picking, Murage, Ferrying, &c. which are for the Good and Ease of the People, and the Profit of them who will take the Benefit thereof, and small and reasonable Sums, the Law does allow them; but if they were great Sums, that tend to the Charge of the People, the Law will judge them void; see 5 Co. fol. 63. the Chamberlain of *London's Case*.

Pontage, Murage, &c. the King may grant.

And as the King cannot by Grant, so neither can he by Writ lay any such Charge upon the People. As to that Writ in the Register 127. and *Fitz. Herb. Nat. Br.* 113. In Case of an Inundation, the King sends out his Commission, to enquire by whose Default such Breach happen'd, and to cause all, who have Lands or Commons in the Level, to be contributory to the making up the Sea Walls; but this Charge cannot be laid upon a Town or County in general, but upon such particular Men who have, or may have Loss or Benefit thereby; and this is done by the Enquiry of a Jury, before the Sheriffs or Commissioners appointed, and so it is at this Day on a Commission of Sewers, 10 Co. fol. 142. *The Case of the Isle of Ely*.

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It has been alledg'd, indeed, that this Charge has been impos'd for the publick Safety, and every one has an Advantage by it.

I answer, I do admit, that in case of imminent Danger, there must be a Defence made by every Man in Person, when the King shall command; every Man is then bound, *per se & sua*, to defend the Kingdom; nor would any Man, in such a Case, refuse *exponere se & sua*. But to lay a Charge in general upon the Kingdom, either for making or preparing Ships, or Money in lieu thereof, is not to be done but in Parliament.

And in that Case, *Mieb. 14. Edw. II. Rot. 60.* between *Heyborne* and *Keylowe*, in a Writ of Error, upon a Judgment given at *Durham* against the Defendant, for entering the Plaintiff's House, and taking away 70*l.* it appear'd, that the Scots having enter'd the Country, and committed great Ravages, and demanding 1600 Marks of the Town, the Commonalty met, and agreed that the Defendant, and some others, should search every House, and take what ready Money they found, and it should be repaid by the Commonalty; and that thereupon they broke open a Chest of the Plaintiff's, and took 70*l.* for which the Plaintiff had Judgment at *Durham*, but it was revers'd in the King's Bench.

For that the Plaintiff had a Remedy for his Money against the Commonalty of *Durham*, because he had agreed to the Ordinance, and sworn to perform it; and the Defendant did nothing but what he had assented to. From whence I infer, that had not he, in particular, consented, the Ordinance would not have been good to bind him, altho' this was a Case of great Danger, and for Defence.

And that Resolution of the Lords, *2. R. II.* That the Commons could not be charg'd towards the Defence but in Parliament, tho' the Danger was so imminent, that it would not admit of such a Delay, and therefore they lent Money. This Record proves directly, that such a Charge without an Act of Parliament, is illegal.

If this Writ should be allow'd, no Man could know what his Charge might be, or how often it might

might be impos'd; and tho' his Majesty would use his Power moderately, Judges, in their Judgment, must have regard to future Times. *Danegelt* was first instituted on Necessity, to redeem us from the Cruelty of the *Danes*: And in the Year 991 it was but 10000 *l.* but it was so increas'd, Anno 1012, that it came to 48000 *l.* And if this Writ be admitted to be well awarded, who knows what Bounds it shall have?

Until the 31st of *Eliz.* but one single Subsidy and two Fifteenths had ever been granted in Parliament, and then a double Subsidy and four Fifteenths were granted. Sir *Walter Mildmay* said, he quak'd to move it, not knowing the Inconvenience that might grow upon it; but it being about the Time of the *Spanish* Invasion, it was granted; and the 43d of *Eliz.* four Subsidies and eight Fifteenths were granted; But these being in Parliament, are not to be accounted Grievances.

Never but one Subsidy and two Fifteenths granted, till the 31st of *Eliz.*

Tonnage and Poundage were granted, that the Crown might have Money in Bank, against a Time of Need; especially for the Defence of the Realm, and the Guard of the Seas, as is declar'd in the Statute of 14 Ed. 2. and former Statutes. And tho' Tonnage and Poundage are not now granted, they are taken, and, I presume, employ'd to the same purposes they were first granted.

It is true, the King may command the Persons of his Subjects, and arrest their Ships to wait on his, for the Defence of the Seas (but they must be at the King's Charges, when they go out of their Countries) But to command the building of new Ships, or preparing them at their own Charges; or to tax the Subject for Defence, or avoiding Dangers, is not warrantable by the common Law.

The King may command the Shipping, as well as the Subjects Persons, in Defence of the Seas.

Also the leaving it in the Power of the Sheriff to tax Persons at Pleasure, I hold to be illegal; in the Case of a Breach in the Sea-walls, it is done by a Jury, and not by himself. If it were doubtful at common Law, whether such a Charge might be impos'd by Writ; yet now it is clear by several express Statutes, that the King cannot lay any Charge upon his Subjects, but by Consent in Parliament.

By

The TRIAL of

By the Statute 25 *Edw. I.* the King grants, that from thenceforth he will take no Aids, Taxes, or Prizes, but by the common Assent of the Realm, and for the common Profit thereof (saving the antient Aids due and accustomed), Now these Aids, 'tis well known, were *Ad Redimendum Corpus, ad filium primogenitum militem faciend', & ad filiam primogenitam maritand'*; which Aids concern not the Subject in general, but those who were liable thereto by their Tenures.

Magna Charta not to be found in the Rolls, nor is it known when it was first granted.

However, if this *Salvo* would have preserv'd the Aid now in question, it was taken away by the Statute *de Tallagio non concedendo*. Which says, that no Talliage, or Aid, shall be impos'd, but in Parliament; and that this is a Statute, I make no question, notwithstanding it is not to be found in the Rolls; for *Magna Charta* it self, and many other known Statutes, are not to be found there.

The next Statute is the 14 *Edw. III. cap. 1.* Which recites the Grant of the great Subsidy of the ninth Fleece, the ninth Lamb, &c. And says, that the said Grant shall not be had in Example in Time to come; nor shall the People from thenceforth be charged to make any Aid, or sustain any Charge, but by common Assent, &c.

I conceive this Statute was made against the Commissions for making or preparing, and sending out Ships, at the Charge of the Towns they belong to; or sending Men out of their Counties, at the Charge of the County. And I conceive this Statute to be perpetual, and not temporary (as my Brothers *Weston* and *Berkley* imagine) for the King grants for him and his Heirs. And, according to *Flowden, Com. 437* where the King grants in his politick Capacity, it extends to his Heirs and Successors, tho' not named. And tho' this Statute is not specified in the Petition of Right, it may well be supposed to be included in these general Words, *Other good Statutes of the Realm* but to

21 *Edw. III.* A Subsidy being granted on every Sack of Wool to be transported till Michaelmas, and the Government ordering the Collectors to continue it till the Easter following: This was complained of in Parliament; and if they were so careful,

careful, that a Subsidy granted should not be enlarg'd, much less would they have admitted of a Writ to lay a Charge, without any Grant in Parliament.

25 *Edw. III.* Enacted that none should be compell'd to find a Man at Arms, but those who held by such a Tenure: And if not to find a Man at Arms, without Assent of Parliament, much less a Ship, with 180 Men at Arms, and all other Necessaries.

And *Ror. Parl. 21 Hen. IV. n. 22.* Which I look upon as an Act of Parliament, and comes to the very Point; the King issues Commissions to several Towns, to make Barges, &c. and the Commons pray that these Commissions may be repeal'd, and there may be no more of this Nature, and they were repeal'd. And as to his saying for the future he would advise with the Lords, I look upon it to be so far from denying that Part of the Petition, that I look upon it only as an Excuse for what had been done; and in fact, there never was any Consultation afterwards about it; nor was ever any such Writ or Commission issued for making such Vessels afterwards, until the present Writ.

13 *Hen. IV. M. 10.* A Grant of a Subsidy, and Tonnage and Poundage, for the Defence of *Calais*, and of the Realm, and the Guard of the Sea, with a Proviso that these should not be had in Example, or charg'd for the future, but by Assent in Parliament.

25 *Hen. IV. M. 43.* A Petition against the Office of Alnager in *London*, granted with a Fee; for that it was contrary to the Statutes, providing that no Talliage or Aid should be granted but in Parliament: They pray therefore these Letters Patents may be void; and their Petition was granted.

Rich. II. cap. 1. It is enacted, That the Subject shall not hereafter be charg'd with Benevolences, or such like Charge. (And these were but in the nature of a free Gift.)

The last Statute is the Petition of Right, in the third Year of the King. Where they pray that none hereafter be compell'd to make or yield any Gift, Loan, Benevolence, Tax, or such like Charge, without

Statute against
demanding Benevolences.

without Consent in Parliament, all which they pray as their Rights and Liberties. Unto which the King answers, *Let Right be done as is desir'd*; which is a full and perfect Statute; and thereby the Liberty of the Kingdom, in this Point, is pray'd and allow'd. And this was done by the Advice of the Judges, of whom I was one. And we resolv'd that this did not give any new Liberty, but declar'd what the Law was, viz. That the Subject could not be compell'd to contribute to any Tax, Talliage, or Aid, but what was granted in Parliament.

It has been objected, indeed, that these Writs went forth, because a Parliament could not be call'd Time enough to prevent the Loss of the Kingdom: That the Writ of the fourth of August shews, that the Pirates had provided a great Navy to infest the Kingdom, and it was fit with speed to provide a Remedy: That the Writ of *Mittimus* says, *Salus Reipublice periclitabatur*, and the King's Certificate by this Writ is *Recordum superlatum*, and it must be left to the King's Conscience. And 'tis said also, that 'tis confess'd by the Defendant's Demurrer; and therefore it must be concluded the Kingdom was in great Danger, and could not stay for a Parliament: And my Brother *Crawley* said, *May be the Parliament would not have consented to these Writs, if there had been never so much Danger.* That a Charge for the Defence of the Kingdom could not be within the Meaning of the above-said Statutes; and that if a Statute had been made that the Kingdom should not be defended, it had been a void Statute, and contrary to Law.

I answer, 1. That the Matter now in question is upon the Writ of the fourth of August; and that the Writ of *Mittimus*, reciting that *Salus Reipublice periclitabatur* the fourth of August, being a Year and half after that Writ was issued, does not help us, neither was it notified to the Sheriff or the Inhabitants of that County, to induce them to provide a Ship; but was only a Notification to the Barons of the Exchequer, shewing that this was the Reason of issuing it.

2. It is not absolutely affirm'd, that there was any such Danger, but only *Quia datum est nobis intelligi*, that Pirates had done Mischief, &c.

3. Had

3. Had the Suggestions been absolute, we are not always bound to believe them; for untrue Suggestions are often inserted in Writs and Patents: Nor does this lie at all on the King's Conscience; but the Law imputes them to those who misinform'd the King, and thrust in such Suggestions; and therefore all Patents granted upon untrue Suggestions are void.

4. The Demurrer confesses nothing but what is well set down.

5. If the Danger be near, a present Provision must be made by Mens Persons, and the present Shipping; which the King may command from all Parts of the Kingdom when Need shall require; but he can't command Money out of Mens Pockets, by distraining their Goods, or imprisoning their Persons. And if the Danger is apprehended from Confederacies and Combinations abroad, there is time for assembling the Senate, and Provision may be made against the Danger by Consent.

It appears, &c. in the Preface, King *Alfred* made a Law that Parliaments should be assembled twice a Year, or oftner, if there was Occasion. And by 11 Hen. III. cap. 12. and the 36 Edw. III. cap. 10. a Parliament was to be holden once every Year, or oftner, if Need requir'd. And it is observable, the third Year of this King what speed was made with the Supply; five Subsidies were given, and two of them payable within a few Days after the Sessions; and there being in this Case seven Months between the Time of the Writ, and the time appointed for the Rendezvous, it must be acknowledged there was time to have had a Parliamentary Supply. And it is not to be presumed, that a Parliament would have deny'd to contribute what was fit for their own Safety and Defence. I confess I believe they would not have consented to these Writs, because none such have been awarded since the Conquest; and if they had, they would not have left it in the Breast of the Sheriff to have tax'd the People at his Pleasure.

Parliaments
to be held twice
a Year by King
Alfred's Laws.

And whereas it has been said, that a Statute to impute such a Charge for Defence is void, I admit that Statute had done mischief, &c.

that if a Statute were made that the King should not defend the Kingdom, it were void. But a Statute, that Money shall not be levy'd, or Men be compel'd to build, or prepare Ships at their own Charges, without Consent in Parliament, I conceive, would be a good Law, and agreeable to Reason. And the King may restrain himself from laying any such Charge without Consent in Parliament. And His Majesty is a Prince of such Justice and Piety, that he would not suffer it if he was truly inform'd it was against Law, any more than his Predecessor Queen *Elizabeth*, who being inform'd by one of her Judges, that an Imposition was contrary to Law, she was very angry, and commanded it to be stop'd; and to some, that had paid their Money, 'twas restor'd: Therefore the principal and only Fault is in those who devised these Writs, and inform'd his Majesty they were lawful; and in his Judges, who affirm'd them to be lawful. But 'tis said this Writ is warranted by the King's Prerogative. If it was, I should not offer to speak against it; we are bound by our Oaths to maintain the King's Prerogative. But if it be against the common Law, and against so many Statutes as I have shewn, then is there no such Prerogative. And whatever is done to the Subjects Wrong, and against the Laws of the Land, is not so much as imputed to the King, but is accounted to be done on some untrue and unjust Suggestion. 21 *Edw. III. fo. 47.* in the Earl of *Kent's* Case, 'tis said, if the King, under his great Seal, make a Grant to the Damage of another, he shall repeal it *Jure Regis*, for the King is accounted to be abused by untrue Suggestions, when he is drawn to do any thing to the Hurt of another; much more when he is put upon any thing conducing to the Hurt of his Subjects in general.

Not can any thing illegal be deem'd an Act of royal Power. *The King can do no Wrong*, but it is to be imputed to those that advised him. Royal Power, I take it, is to be used in Cases of Necessity, and imminent Danger, when ordinary Courses will not avail; as in a Rebellion, or sudden Invasion; there martial Law may be used, we may not stay
for

for legal Proceedings. But, in time of Peace, and no extreme Necessity, legal Courses must be used, and not royal Power.

Therefore, the 31st of Hen. VIII, when Rebel-
 lions were frequent, on the suppressing of Mo-
 nasteries, and the King was enforc'd to use royal
 Power, a Statute was made, enabling the King, by
 the Advice of such of his Council as were therein
 nam'd, by his Proclamation to make Ordinances
 for Punishment of Offences, and lay Penalties which
 should have the Force of a Law (with a proviso
 that no Man's Life, Goods, or Estate, should be
 affected thereby.) Herein the royal Power was for-
 tified by a Statute! But even this was thought in-
 convenient, and therefore was repeal'd 1 Edw. VI.

Proclamations
 allow'd the
 Force of a Law
 in the Reign of
 Hen. VIII.

And the King having a Power to command all
 Persons in the Kingdom to the Defence of the Sea-
 Coasts, and arrest all Shipping to attend the Guard
 of the Sea, in time of Danger; these have al-
 ways been look'd upon a sufficient Defence against
 any Prince whatever; and there was no Necessity
 to issue Writs to every County of England, to pre-
 pare Ships at their own Charge. And that this was
 a Course frequently taken, appears by many Re-
 cords. The 23 Edw. I. M. 4. The French King pre-
 par'd a great Navy to invade the Kingdom, & Lin-
 guam Anglicanam de terra delere. Whereupon the
 King commanded all the Ships, and Men with
 Arms, to be in a Readiness. See also the 10th,
 12th and 13th of Edw. III. 5 Hen. IV. 4 Hen.
 VIII.

And if it were lawful to lay such a Charge upon
 maritime Places, yet to charge inland Counties
 with providing Ships, Mariners, &c. is not legal,
 or warranted by any Precedent; the Law will not
 require Impossibilities; they have no Mariners in
 this County, none that can guide a Ship; they are
 conversant in Matters of the Plough and Husbandry
 here; few of the Inhabitants ever saw a Ship; and
 they shall not be oblig'd to look for Mariners in
 another County: Therefore, when Writs have
 been awarded to inland Towns, supposing them to
 be maritime Towns, when the Truth appear'd,
 they were discharg'd, 13 Edw. III. part 1. M. 14.

As

As to the Precedents that have been so strenuously alledg'd, I have read all that the King's Council have sent me, and diligently consider'd them; and I do not find any Precedent or Record of any such Writ, sent to a Sheriff of an Inland County, to command the making of Ships at the Charge of the County. It is true, before the 25 Ed. 1. there have been Writs to Maritime Towns and Ports, as London, &c. to provide Ships and Mariners, and send them to such Places as the King appointed, upon just Cause to fear any Danger; and it is but reasonable, that they who have Ships and Mariners should be at the King's Command, for the Defence of the Sea and Kingdom: But these were most commonly at the King's Charges; sometimes indeed they were ordered to be at the Charge of the Ports and Towns adjoining; which, I suppose, was the true Cause of that Complaint in Parliament, 25 Ed. 1. and the making that Statute for altering that Course; for there is no Record of any such Writ afterwards in that Reign to the Ports, to provide Ships at their own Charges.

Writs to Maritime Places to provide Ships at their own Charges.

In the 11th, 12th and 13th of Ed. 3. indeed there were many Writs to the Maritime Places, to send Ships at their own Charges, which occasion'd the Statute of the 14th of Ed. 3. cap. 1. And after that Statute, there is but one Record of any such Writ issued to a Maritime Town; and this was grounded upon an Ordinance of Parliament, 1 Ric. 2. m. 32. That all ancient Towns, Cities and Boroughs, should have their Charters confirm'd, without Charge, provided they wou'd furnish a Ship for Defence of the Realm. So that this was not compulsory, but voluntary to those who wou'd have their Liberties confirm'd. As for those issued 1 Hen. 4. they were complain'd of, and recall'd. [*Here follows an Abstract of the several Records above cited in this Cause.*]

It appears upon View and Examination of these Records cited by the King's Council, that none of them prove the sending any such Writs, either to Inland or Maritime Counties, to prepare Ships; or even to the Maritime Towns after the 14th of Ed. 3. to find Ships at their own Charges. Whereupon

upon I conclude, that this Writ is not warranted by any former Precedent.

I come now to shew, that the Motives in this Writ are insufficient for the preparing of a Royal Navy. The Writ says, *Quia datum est nobis intelligi, quod quidam Prædones & Maris Grassatores did take the King's Subjects, &c. Cumque ipsos conspiciamus Navig' indies præparantes ad Mercatores nostros molestand' & Regn' nostr' gravandum.* But in former Precedents the Inducements are, That great Princes, in open Hostility, have provided great Navies, with Soldiers, &c. with Intent to invade the Kingdom; and therefore it was necessary to provide a Royal Navy, and that all the Ships of the Kingdom should be assembled to withstand them. But that such Preparations should be made against Pirates, was never seen in any Writ before; for they do but surprize a Ship now and then by stealth, and run away when a Force approaches. And therefore it has been usual for the Admiral or Vice-Admiral, with a small Squadron, to scour the Coasts, and not employ the whole Fleet: And there is no Fear of losing the Dominion of the Sea by any Force that Pirates can raise; neither is it necessary that every County shou'd be charg'd to man out Ships against them.

And the Command to find Wages for the Sailors for 26 Weeks, after the Rendezvous, appears still more illegal, if we observe, that in the Writs of Summons for Knights-Service it is expressly mention'd, That after 40 Days, even they should be at the King's Expence. And in the several Commissions of Array, after the marching out of their respective Counties, they were to be at the King's Charge. By 18 Ed. 3. cap. 7. it is provided, That Men of Arms, Hobbellers and Archers, chosen to go in the King's Service out of *England*, should be in the King's Wages, from the Time they leave their respective Counties. From all which I infer, That the Command for Soldiers Wages for 26 Weeks after their leaving *Portsmouth*, and the Assessment being entire, as well for Wages as other Charges, is utterly illegal.

And the Command to assess Men at the Sheriff's Discretion is not warranted by Precedent. Assess-
ments

Whether the Militia may be commanded out of their Counties at the Charge of the County.

ments for Contribution have usually been by Commissioners, who are presum'd to understand these Matters. And that Power given to Sheriffs to imprison (especially as it has been us'd) is illegal, and contrary to several Statutes. 5 *Ed. 3.* says, No Man shall be attach'd, or his Goods seiz'd, contrary to *Magna Charta.* 37 *Ed. 3. cap. 18.* recites, That by the great Charter none shall be taken or imprison'd but by due Process of Law; yet, by colour of this Writ, the Sheriff may imprison any Man, even a Peer, it being for a Contempt. 6 *Co. 32.* it is resolv'd, 2 *Ed. 3. fo. 2.* That one cannot be imprison'd before he is indicted, or upon due Process of Law: And therefore I hold this Writ to be illegal.

There is a Clause also in the Writ, That if more Money should be collected, than was necessary, it shou'd be repaid to the Contributors, in a rateable Proportion. But here being no Ship or Tackling provided, how can it be known whether more is gathered than will suffice? The Money is either detain'd by the Sheriff or Collector, or apply'd to other Uses, and so the Writ is not perform'd, and the Money assess'd and unpaid cannot be duly demanded. Admitting the Writs were legal, the Assessment, as it is certified, is not sufficient to charge the Defendant; for it does not certify, that any Ships, with Ammunition, &c. were prepar'd; and this is a Year after the time appointed for the Rendezvous: And this not appearing to be done, it shall be taken not to be done. For if one be charg'd, in Consideration of a thing to be done before a certain Time, to pay a Sum of Money, if the Thing be not perform'd at the Time appointed, none can be charg'd with Non-payment of the Money after the Time is pass'd.

Therefore if a Ship be not provided according to the Writ, or Money employ'd for preparing a Ship, for and in the Name of the County, all those, who have paid their Money, may demand it again of the Sheriff or Collector; for the Money cannot be disposed to other Use than that for which it was paid, by any Command even under the Broad Seal, altho' it be for their Advantage; for private Men having an Interest in it, that cannot be taken away or dispens'd with.

The King cannot dispense with a Penalty where another has an Interest in it.

with. 7 Co. 37. where, in Case of Penal Laws, a Penalty is given to the Poor of the Parish, the King cannot dispense with it, because the Poor have an Interest in it. Indeed where Part is given to the King, and Part to the Poor, he may dispense with his own Part.

And whereas 'tis said, the Money is taken by way of Accommodation, because the County are not skill'd in these Matters; and the thing is done for them, perhaps at less Charge, than they cou'd provide the Ship requir'd: I answer, If the Writ be legal, the County must do it at their Peril. And when they have provided a Ship, and the Service is done; as my Brothers *Weston* and *Berkley* observ'd, the Ship is their own; and there is little more than the Expence of Victualling lost, and the Kingdom might be much strengthen'd by such an Addition of Ships; and the County might have had an Account how their Money was bestow'd; and if there had been a Surplusage, it shou'd have been restor'd them; whoever detains it, or employs it to another Use, is by Law accountable for it to the Contributors, and liable to a Fine besides.

Hill. 16 Edw. III. Rot. 23. B. R. A Soldier, who had three Pounds advanc'd him to go into the King's Service, and did not go, was indicted, and condemn'd to pay a Fine, and to repay the Money to the Hundred of which he receiv'd it. *Hill. 20 Edw. III. Ro. 37. B. R.* Two Constables having receiv'd six Marks of their Hundreds for setting out Soldiers, and retaining Part of the Money, were fin'd and imprison'd, and compell'd to find Sureties to repay the Money in their Hands. By both these Records it appears, that those who have receiv'd Money of the County to prepare Ships, and have not employ'd it accordingly, are liable to pay a Fine to the King, and answerable to the County, of which they received it.

Lastly, the *Certiorari* being awarded to the late Sheriff, is wrong awarded; for all Writs are to be directed to some immediate Sheriff, requiring him to demand of the late Sheriffs what was done upon the former Writ; and they are to return to him what has been done, and he must return the same

All Writs must
be directed to
the present
Sheriff.

Sir George
Croke for Mr.
Hamden.

to the Court; therefore the *Scire Facias* grounded thereupon is not good. Also the *Scire facias* not shewing to whom the 20 Shillings is to be paid, is uncertain, and consequently insufficient. I conclude therefore upon the Whole, that no Judgment can be given to charge the Defendant.

The Argument of Sir William Jones Knt. one of the Justices of the King's-Bench, in the Exchequer-Chamber, in the Case of Ship-Money.

Sir William
Jones's Argu-
ment.

In a Case of this Nature, it is difficult to escape the Censures of the People, especially those of least Understanding, who speak only according to their Affections. It were happy for us, if we were to be judg'd by the Learned; when it is by the ignorant, no wonder if we meet with Calumny and Reproach: But however I may happen to fare in the Opinion of the Multitude, I shall make no Shipwreck of my Conscience.

The Question is, Whether the King, when he perceives the Kingdom in imminent Danger, and a Necessity of a Defence, may not, by his Writ, send to all the Counties, as well Inland as Maritime, to charge them to find Shipping, Men and Ammunition, for a convenient time, to go to defend the Kingdom (no Money being to come into the King's Purse?) The Question is not, If the King may draw this into a perpetual Charge? For this is founded upon a Fear of Danger; and when that ceases, the Taxes must likewise cease. *Br. Tit. Protection, fol. 39.* it was held, The King could not grant a Protection for three Years, tho' he might renew it every Year, as there was Occasion; so here, tho' the King, upon an immergent Occasion, may command Ships, yet he cannot make the Charge perpetual, because the Occasion may cease.

We have jointly and severally delivered our Opinions in this Case, and subscrib'd them; yet not so, but if better Reason was shewn us to alter them, we might recede from them. For my part, I am an old Man, ready for my Grave, my Tongue and my Heart shall go together: I declare I am of the
same

same Opinion I was then; I think the Grounds of Law and Nature support it. These are undoubted Maxims, *Salus Populi est suprema Lex. Qui sentit commodum, sentire debet & onus. Quod omnes tangit, ab omnibus debet supportari.* So that when there is imminent Danger, the Charge ought to be laid on the whole Kingdom; and this, I think, is not deny'd by the Defendant's Council. Indeed it must not be every Fear or Rumour that must draw this Burden upon the Subject; but such a Danger as the King in his Judgment declares doth require a speedy Defence; he is the sole Judge of the Danger, and how to prevent and avoid it.

If the King is, by Law, to defend the Kingdom, surely he may lay a Charge in order thereto; if he have not such a Power, how shall he defend his People? The King, by Law, is the Protector of the Bodies, Lands and Goods, of his Subjects; he has a Prerogative in them for this End, in time of Danger, not for his own Profit. The King cannot free a Man from this Allegiance, without an Act of Parliament; neither can the Subject free himself, as was held in Doctor Story's Case.

The King cannot free a Man from his Allegiance.

The King cannot cut a Man's Woods, or dig Gravel in a Man's Lands for his private Use, but for the publick Good he may, and make Bulwarks upon his Grounds. So tho' the King can't compel a Subject to build the Walls of his own House, yet he may command Pontage, Murage, &c. where the Subject has a Benefit. And in the first Year of King James an Imposition was laid, without Consent of Parliament, on Merchandize, it being in a Case of Necessity, and for the publick Good.

The Objections have been many, my Brother Croke did double and redouble them. Brother, we sit next one another; ancient Judges, tho' of different Opinions: I speak according to my Conscience, as you have done according to yours. He says, By the Laws of the Kingdom the Subject hath a Property in his Goods; so that without their Consent they cannot be taken away. I answer, This does not trench upon his Property; if this be a lawful Prerogative, how is the Subjects Property invaded? The Law annex'd this Charge to the

Lands and Goods of the Subject from the Beginning, and made them liable to it by a tacit Condition. If Goods be given to one on Condition, there is a Property in the Donee, tho' clog'd with a Limitation and Condition. I would not have Men clamour, as if the Subject was divested of the Property of his Goods, when it is nothing but what is for the Defence of the Kingdom.

I know not why there should be any Difference between an Inland and a Maritime County, since all are engag'd, as one entire Body, for the common Defence; and the Inland Counties have a Benefit by sending their Wools to Sea: Besides, the King may unite an Inland to a Maritime County; and before the Division of Counties, no doubt, but the Charge was general over the whole Kingdom.

And whereas 'tis said, this may prove a great Inconvenience, if the King may charge when and what he pleases by his Writ: I answer, As the Law supposes this Trust in him, it is not to be presumed he will require it of his Subjects, but when there is Occasion. It is objected further, That Dr. Cowel and Dr. Manwaring were sentenc'd in Parliament for these Tenets. I admit they were deservedly censured: Dr. Cowel wrote, That the King might make Laws without Consent in Parliament; and wrote against the Common Law, which the King is sworn to maintain, and his Sentence was just, I gave my Voice for it. Dr. Manwaring preach'd two Sermons, importing, That the King was not bound to observe his Laws; and that the Rights and Liberties of the Subject were at the King's Dispose, &c. and that the Authority of Parliament was not necessary to the granting any Subsidy for the King's own Use; but this is to provide Ships for the Defence of the Kingdom, which is a different Case.

Nor shall any general Words in a Statute extend to take away the King's Prerogative. If they would, why did not they take away the *Aids pur faire fitz Chivalier*, & *pur file marrier*? It is admitted, that general Words did not include them. My Brother Crawley held, That even special Words in an Act of Parliament would not take away the King's Prerogative.

rogative. And I heard it resolved in Parliament,
 1 Jac. when it was mov'd, that there might be no Wardships or Tenures of the King; that such an Act to deprive the King of Tenures would be void, because they were inherent in the Crown; every Man holds immediately or mediately of the King.
 2 Hen. VII. an Act to restrain the King's *Non obstante* to dispense with Penal Laws, as not to pardon Murder, is void; his Person and Royal Prerogative cannot be restrained by Parliament.

I am of Opinion also, that the Record has express'd sufficient Cause for the Crown to require this Aid. If the King say there is Danger, that is not traversable; and had he said no more than *pro Defensione Regni*, it had been sufficient.

Upon the whole, my Advice is, that Judgment be given that Mr. Hambden be charg'd with the 20s. provided none of it come to the King's Purse; for if it do, I am against it.

Mr. J. Jones for the King.

The Argument of Sir Richard Hutton Knt, one of Justices of the Court of Common Pleas, in the Exchequer-Chamber, in the Case of Ship-Money.

At this Day a Charge of this Nature cannot be impos'd on the People (unless in time of actual War) but by Act of Parliament.

Mr. J. Hutton's Argument.

First, It is against *Magna Charta*, which says, *Nullus liber homo capiatur, vel imprisonetur, aut disseissetur de libero Tenemento suo, vel Libertatibus, &c. aut aliquo modo distringatur, aut in Carcerem mittatur, nisi per legale Judicium Parium suorum, vel per Legem Terræ.*

The 25th of Edw. III. cap. 5. the King grants for him and his Heirs, That he will not draw such Aids and Prizes into Custom, not only Taxes for War, but for any other Business whatever, *forisque de comune Consent de tous le Realme.*

34 Edw. I. 'Tis granted, no Aid shall be levell'd but by Consent. 14 Edw. II. No Aids shall be levy'd but in Parliament. By 25 Edw. III. 'tis enacted, That none shall be compell'd to find Hobbellers, *si il ne soit per comune Consent in Parliament, par ceo est encounter le droit del Royalme.* By 1 Ri. II.

None shall be charg'd with Benefvolences, or such like Charges : And lastly, There is the Petition of Right, which is a Confirmation of these Statutes.

As to the Authority of the Year Books, that Case cited by my Brother Croke I shall confirm, tho' slighted by my Brother Jones, viz. the 13 Hen. 4. where an Office was granted for measuring of Cloth, it was held to be void, for that the King could not lay any Charge upon the People out of Parliament, And that other Authority of *Portescue*, who says expressly in his 9th Chapter, that the King cannot alter any Law ; that he governs his People not only by a royal, but politick Power, and can lay no Charge on them but in Parliament, is home to this Point.

But it was objected to these Statutes by my Brother *Crawley*, that this royal Power of the Prerogative was so inherent in the Crown, so inseparable, that an Act of Parliament could not take it away.

The King
might have cut
the Subjects
Woods, for re-
pairing his
Castles, at com-
mon Law.

I confess there are some such inseparable Prerogatives, such as the *Tenure in Capite*, which the King can't release : And when a Law was propos'd for taking away the Court of Wards, it was held it would be a void Law : And an Act of Parliament that the King should not defend the Kingdom, or that he should have no Aids of the Subject towards the Defence ; such Acts could not bind, because they would be against natural Reason : But in this Case here is no Act that restrains the King from laying a Charge, but only ties him to one Means, viz. by Parliament. And there are several Statutes in force, whereby the Prerogative is restrain'd ; as the cutting the Subjects Woods to repair the King's Castles, which he might have done before *Magna Charta* : And the Prerogative of *nullum tempus occurrit Regi* is restrain'd in the Case of a Lapse of a Church, by the 25 Ed. 3. cap. 1. &c.

As to the Precedents, I don't see but *Danegelt* might have been put in use now as well as formerly, had it not been for those Statutes of *Edw. 1.* and *Edw. 3.* above cited, for it was laid down only when the Danger ceas'd, and appears to be taken up, or continu'd by Princes at their Pleasure ; but
since

since these Statutes it was never taken, and therefore I look upon them as binding : And this I take to be a full Answer to that and all other Precedents before those Statutes : And with the Statute of the 14 Ed. 3. I answer all those Precedents of the 10, 11 & 12 Ed. 3. The 2 H. 4. & 2 R. 2. it was resolv'd that Money could not be rais'd but in Parliament, and all the Precedents since are but Commissions of Array : And I agree there are many Statutes that Men should be array'd ; as the Statute of *Winchester*, &c.

As for the King's granting Pontage, Murage, &c. the Law admits of it, because the Subject hath a particular Benefit by them.

It is urg'd that in this Case here is no Money to be paid by the Subject, but only a Ship to be provided by the Sheriff ; and it is agreed on all Hands, that if the Intent of the Writ had been to levy Money, it would have been void : But, I say, it appears plainly by the Record that no Ship is provided at all ; and if none, then a Writ cannot be issued against him for Disobedience ; and it is known to all the World that not Ships, but Ship-money is wanted : There is a Pretence of preparing Ships, but the End is to prepare Money ; as in *Yorkshire* 12000 *l.* And if a Ship had been expressly alledg'd to have been built, it might have been travers'd ; but as it is, Mr. *Hambden* could do nothing but demur.

Agreed that if the Writ had commanded Money to be levy'd for the King's Use, and not for the publick Defence, it would have been illegal.

As to my subscribing the Opinion, I did indeed set my Hand, but my Opinion was always against it ; I did it but in Conformity to the greater Number, as is usual, nor are the Words we subscrib'd pursu'd ; besides, we had but a short Time allow'd : The King's Letter is dated the 2d of *February*, and our Opinions were the 7th, and we had then heard no Arguments ; and God forbid but a Man may alter his Opinion upon hearing better Reasons.

And tho' we were of Opinion the King might charge in the Case of a general Danger, we never meant a Danger from Pirates, but upon imminent Necessity and apparent Danger ; and I still agree, that in time of War, when an Enemy is in the Field, the King may use the Subjects Goods.

In the Reign of *Hen. 8.* Commissions were issu'd to take a sixth Part of the Subjects Goods; but they grew so uneasy, that those Writs were forc'd to be recall'd; and the King laid the Fault on the Cardinal, and the Cardinal said it was by the Direction of the King.

The Benevolence in Queen Elizabeth's Reign held to be illegal, and the Money return'd.

In the latter End of Queen Elizabeth's Reign, whether thro' Covetousness, or by reason of the Wars that happen'd, she desir'd a Benevolence, and Money was gather'd in all the Inns of Court; I my self paid 20 s. But when the Queen was inform'd by the Judges it was against Law, she order'd the Money collected to be paid back, and I had my 20 s. repaid me.

As to the Writ it self, I think there was no sufficient Danger express'd in it; and as for the *Mittimus*, which came out almost two Years after, wherein 'tis said, *Salus Regni periclitabatur*; this cannot make that legal, which was not so *ab initio*; no subsequent Matter could help it; and the Power given to the Sheriff, *quos Rebelles invenerit*, to imprison and distrain those who refuse to pay, is against *Magna Charta*.

Besides, to order the Sheriff should rate Men *secundum statum & facultates*, makes him both Judge and Party, if he is to pay any thing himself.

And I conceive the *Scire facias* could not be award'd to one who was not Sheriff at that time; he was out of the Sheriffwick: I never saw a Writ that went to two Sheriffs of one County, and two several Returns made by the two Sheriffs.

Then this Money could not be rais'd by *Scire facias*, because the Writ directs it to be done by Distress or Imprisonment; and the Sheriff not having follow'd the Direction, must answer the Contempt.

Five Shillings a Tun impos'd on Currants by the King, 4 Jac.

I admit the King may lay Impositions on Merchants Goods, but then he must defend the Merchants from Pirates: In that Case, 4 Jac. five Shillings a Tun were laid upon Currants; I was of Council there; and it was adjudged the Imposition was lawful, for that the King had the Command of the Sea, and might restrain the Merchants from Traffick, and he secur'd their Goods: But as this Case is, I conclude, both for Matter and Form, you are not to give Judgment for the King.

Mr. J. Hutton for Mr. Hambden.

Sir

Sir John Denham, one of the Barons of the Exchequer, being sick, caused a Paper to be deliver'd in Court, importing, that his Opinion was for the Plaintiff. And being desir'd to explain himself, he sent another Paper, declaring he took Mr. Hambden to be Plaintiff; for it appear'd by the Record, that he coming in upon Proceſs, *queritur de colore premissorum graviter vexatum, & hoc minus juste.* And he gave us Reasons for his Opinion: 1. That the King, could do no Wrong. 2. That the King, being of a corporate Capacity, could take neither Lands or Goods of the Subject but by Judgment upon Record: There must precede some Judgment in the Exchequer, or some other Court of Record, whereby his Majesty could be entitled to the Lands or Goods of a Subject; and finding no such Judgment given in this Case, he was for Mr. Hambden.

Sir John Denham for Mr. Hambden.

The Argument of Sir Humphrey Davenport, Lord Chief Baron of the Exchequer, in the Case of Ship-money.

No one has a more tender Regard to the King's Prerogative than my self, and we are all bound to maintain it by the Oath we take on our Promotion; but I have look'd into the Records, and according to what I understand of the Laws and Customs of England, I must confess that upon this Record Judgment ought to be given for the Defendant, *Quod Johannes Hambden sit quietus, &c.* for I conceive this Charge thus commanded, and thus taxed, is not warranted by the Laws and Customs of England.

Lord Chief Baron's Argument.

The Writ of the 4th of August 11 Car. is directed to the Sheriff of Bucks, the Mayor and Burgeſſes of Buckingham, and Bailiffs and Burgeſſes of Chipping-Wiccombe, & *probis hominibus Com' Bucks*; and they are charg'd upon their Allegiance, before the 1st of March following, to prepare at their own Costs, thro' the whole County, a Ship of War to attend the King's Navy for the Custody of the Sea, and to maintain it at their own Costs for twenty-six Weeks: Then there is given a Power to the Sheriff, Mayor, &c. to tax the whole County *secundum statum & facultates,*

When

When I consider the first Charge, to prepare a Ship at their own Charges, and the next for Taxation, I don't see how they agree, one is repugnant to the other; the first Part commands the Charge to be general, by all; and by the last the Power is limited to a particular Person, viz. the Sheriff, Mayor, or Bailiff, and they are exempted from the Charge, for they can do no Act upon themselves. It should have been *per sacramentum proborum hominum*: I hold the Law to be clear in this Point, considering the two different Powers.

The Power of Preparation is in the Sheriff, Mayor, Bailiffs, & *probi homines* together; but afterwards the Power of Taxation is left to the Sheriff, &c. and how shall he tax himself? Or can he find himself *inter Rebelles*? or commit himself to Prison? The first Act which the Sheriff is charg'd to do, is by the second Power discharg'd. These Powers do not cohere, and therefore are not warranted by Law.

Again, this Charge cannot be laid by the Sheriff at his Pleasure, it must be *per sacramentum proborum hominum*: Where things are put in certainty by the King's Courts, there he may execute or take a Man's Goods, or imprison him; but where there is an Uncertainty, the Law hath annex'd to his Office a Method of reducing them to a Certainty, viz. *per sacramentum proborum hominum*, as in the Case of Partition by Parceners, &c. He must impanel a Jury to make an equal Partition.

I do not deny but this Tax was very fit to be impos'd, if the Power given to the Sheriff had been as warrantable; but that second Power to free himself, and lay it upon others, is not good.

As to the Causes mention'd in the Writ: An Incursion by Pirates, I conceive, is no just Cause; but as to those Expressions in the Writ, *Quia datum est nobis intelligi, ut informatur, vulgaris est opinio, rumor est, &c.* they are well enough according to the Precedents. The King needs not discover how he knows it, it is sufficient if he declares the Kingdom to be in Danger; I agree that must conclude the Party, and that he is the sole Judge of it. The Case is

If the King declares the Kingdom to be in Danger, it is not to be disputed, he is the sole Judge of it.

not

not traversable, the Writ must be obey'd, so as it agrees with the Laws and Customs of *England*.

The King is to defend the Kingdom against Pirates and Robbers, says Doctor and Student, but not against a sudden Invasion, at his own Charge. The *Prædones* mention'd when *Danegelt* was given, were such Powers as endanger'd the whole Kingdom. This Tax was justly impos'd to repel the *Danes*, who were common Enemies; but I hold that Tax was taken away by the Statutes of *Edw. I.* &c. And therefore, if for a private Danger the Assessment be impos'd, it is not according to the Laws and Customs of the Realm.

But admitting the Charges in the Writ to be legal, the Question is, whether the *Certiorari* and *Mittimus* do legally revive the first Writ, it being irreturnable, and not executed according to the Tenor of it within the Time prefix'd?

Now the *Certiorari* is dated a Year and half after the first Writ; and the Nature of a Writ not returnable, is to command a positive Thing to be done within such a Time; and if it be not done accordingly, there is an End of the Force of that Writ. So here the Power given to the Sheriff, not being executed by him in due time, cannot be renew'd now; and tho' afterwards in the *Mittimus* these Words *Salus Regni periclitabatur* are inserted, they will not revive or make good the Commands of the first Writ; it is no more than a Suggestion, upon which a *Scire facias* cannot issue. Were the Writ the fourth of *August* never so good, the Writ thereupon is not legally issued.

The next Question is, whether this Debt belongs to the King? And I perceive it does not; for the very Writ of the fourth of *August* expressly provides that it shall be applied to no other Use, but to prepare a Ship; and tho' this was a worthy and gracious Act in his Majesty, yet the Matter has not been so legally executed, as that the King may have a *Scire facias*. If Judgment be for the King, it must be with this Limitation, that it does not go into the King's Coffer, as my Brother *Jones* observ'd. This Money was preordain'd only to prepare a Ship, and it does not appear whether any
Ship

Ship was made, or any Collector, or any Act concerning it; therefore how shall we give Judgment? The *Scire facias* is, that Mr. Hambden should shew Cause why he should not pay the Sum impos'd upon him; but whom he should satisfy, or to whom the Money should be paid, *non constat*; therefore I cannot see how Judgment can be given *quod one- retur*.

Another Reason why Judgment cannot be upon this *Scire facias*, is, that by the *Mittimus* to us in the Exchequer the Record itself is not certified, but only the Tenor of it; and I conceive the Law to be, that if the Record be in any other Court, whence Execution may be awarded, and the Tenor of that Record be sent into another Court, where Execution may be likewise awarded, a *Scire facias* cannot issue upon such a Record. The Record itself ought to be sent, otherwise there may be two Executions upon one Judgment.

Where there is an Expectation of Danger certified by the King, he may command Aid of the Subjects.

I come now to the great Question, concerning the Danger of the Kingdom. And I hold, according to our former Resolution, that where any Part of the Kingdom is actually in Danger, or in Expectation of Danger, and the same is express'd by the King's Writ, the King may charge his Subjects, without Parliament, towards the Defence thereof, for *necessitas est lex temporis*: And I hold the King to be the sole Judge of the Danger; and the Danger being certified by his Majesty, that is not traversable, so that the Cause expressly appear upon the Record; but if a Parliament-Advice may be had, and the Danger not so imminent, then no such Charge can legally be laid out of Parliament. Our Advice was, when the Necessity would not admit of the Delay of a Parliament, when an Enemy was in view, or expected. In such a Danger the King might charge the Subject.

In the Invasion in 88, if the Queen had not used her royal Power, without calling a Parliament, the Kingdom might have been lost. I hold, that in Times of Necessity the King may command this Aid by his Writ under the Great Seal, when the Danger is instant; pay, the Expectation of it is not traversable,

Those

Those Statutes which enact that no Aid shall be given but in Parliament, do not extend to Cases of Necessity; for certainly, in Cases of Necessity, there is a Right belongs to the King to prevent Danger; then the King has a Power, by his Prerogative, to compel Aid: And if an Act of Parliament should be made to restrain such a Charge, it would be void; therefore I'm of Opinion it may be done without Parliament (as it was in 88) so long as an apparent Danger continueth.

However, I conceive the Mandates in the Writ of the fourth of *August* are not good in Law, or well grounded; and that the Information afterwards in the *Mittimus* cannot make that Writ good, which was at first defective; and the Return of the late Sheriffs is not effectual, upon which Judgment may be given; and we cannot give Judgment *quod oneretur*, unless we could find to whom; and therefore I am of Opinion Judgment ought to be given for Mr. Hamden.

Lord Chief
Baron for Mr.
Hamden.

The Argument of Sir John Finch Kt. Lord Chief Justice of the Common Pleas, in the Case of Ship-Money.

Before I enter into the Merits of the Case, I shall observe by what Steps this Cause comes to Judgment. The first Writ went out to the Maritime Places and Port Towns, the 20th of *October*, in the 10th Year of the King; and his Majesty rely'd very much upon the Judgment of Mr. Noy, the Attorney General, therein.

The Argument
of the Lord
Chief Justice
Finch.

The first of *October*, the Writs, Records, Commissions, and other Precedents, were brought to me, as they had been formerly to my Lord Chief Justice and my Lord Chief Baron; and having diligently perus'd them, we three did confer together, and deliver'd our Opinions under our Hands, That the Dominion of the Sea belong'd to the King, and he was the sole Lord and Proprietor thereof; and that the Defence thereof belong'd to his Majesty: That the Cinque Ports had been requir'd heretofore, at their own Charges, to prepare such Number of Ships, and of such

such Barthen as Occasion requir'd; and that as to the Time and Place, and Continuance of their Attendance, it was at the King's Pleasure; he was the sole Appointer, and only Judge.

Afterwards, His Majesty finding the Danger to grow general, and conceiving it to be unreasonable the Maritime Parts should bear all the Charge, where the whole Realm was interested, he requir'd the Opinion of my Lord Chief-Baron, and myself; who having consulted the Precedents, and the Rule of Law, in *June 1635*, we delivered our Opinions first verbally, and afterwards under our Hands, (*viz.*)

Whereas the Charge of defending the Sea had been impos'd on the Ports, so where the whole Kingdom is in Danger, the Charge ought to be borne by all the Subjects of the Realm. And among other Writs, that to the Sheriff of *Bucks* was issued.

After which, his Majesty finding the Legality of the Writs question'd, requir'd the Opinions of all the Judges, and we, every Man by himself, delivered his Opinion under his Hand, as has been recited: My Brother *Croke* subscribed singly by himself. I do not speak this as though he were to be concluded by it, but that the World may see how his Majesty's Regal and Legal Power go together; and to the end that when Judges singly deliver their Opinions to the King, they ought to see very good and pregnant Reasons to vary from that Opinion, though it be not binding. This his Majesty requir'd for his private Satisfaction; and I dare affirm, these Opinions were so delivered by us, that no one Judge knew the Opinion of the rest.

The second of *February*, 1636, his Majesty sent a Letter to all the Judges to have their Opinions together, to which we return'd an Answer the 7th: But we had had this Matter under Consideration from *June 1635*, so that there was no Surprise.

My Brothers *Hutton* and *Croke* did then agree, that the King was sole Judge of the Danger: [Indeed, my Brother *Croke* says nothing of this in his Argument now; and my Brother *Hutton* speaks nothing against it.] We all declared we did not deliver

liver those Opinions as binding; nor were they so requir'd of his Majesty; however, they were soon after publish'd.

I come now to the Case as it stands in Judgment before us: And I am of Opinion, that the Danger to the whole Kingdom ought to be express'd clearly in the Writ; for if no Danger, no Reason for the Charge; and I conceive this Danger ought to be express'd in the Writ of the fourth of August, and not in the *Mittimus*; for he was not liable to the Charge but by the Writ of the fourth of August.

But I conceive that the Words, *Datum est nobis intelligi*, are certain enough; and it is sufficient that the King knows the Danger: I hold also that the Danger itself with the Motives in the Writ is sufficient. I shall not rely on the Dangers mention'd from Pirates, tho' terrible enough, but upon this, *Consideratis periculis quæ undique his guerrinis temporibus imminet, ita quod nobis & Subditis nostris defensionem maris & Regni nostri omni festinatione qua poterimus convenit, &c.*

But had there been no Preamble, I hold the Command setting forth the Danger to be sufficient, where 'tis said, *ex inde cum navibus nostris & navibus aliorum fidelium subditorum nostrorum pro tuitione maris & defensione nostrorum & vestrorum, &c.* To express the particular Danger is not necessary, it might have been more clear; but in my Conscience, the Danger is sufficiently enough express'd in the Writ.

And for the preventing this Danger, tho' my Brothers *Hutton* and *Croke* would have it to be by raising Money, because of the Clause for the Distribution of the Surplusage, there is a great deal of Difference between Payment of Money and finding a Ship; if my Brother *Croke* be requir'd to find a light Horse and Arms, if he have none, he must hire, or buy one with his Money; but yet the Charge is not for Money, but for finding a light Horse.

As to that Objection, that *Bucks* is an inland County, and they cannot build a Ship there, they may hire one nevertheless, or contribute to the building one in a proper Place. And that the King may,

may, in a time of Danger, require the Subjects to join with him in preparing Ships for Defence of the whole Realm. I offer these Reasons. 1. The Defence of the Kingdom ought to be at the Charge of the whole Kingdom. 2. The Power of laying this Charge is, by the Policy and fundamental Laws of this Realm, solely vested in the King. And 3. As the Law has given this Power to the King, so has it given him the Means to put these Things in execution.

The Commonwealth have a Property in every Man's Estate *pro bono publico*.

As to the first, Every Thing in Nature ought to defend itself; and *Quod omnes tangit, ab omnibus supportari debet*; and something ought to be spared for the Safety of the rest; a Husbandman will spare some of the best of his Ground for Ditches and Fences; and as the Law gives every Man a Property in his own Goods, so every one has a Property in another's Goods, for the common Good: And the Commonwealth has not only a Property in every Man's Goods in time of War, but also in time of Peace; and therefore a Trespass in Lands or Goods may be punish'd by Indictment at the King's Suit, as well as the Subjects; and the Reason is, because of the publick Interest the King has in every Subjects Goods, for the common Good: And my Brother Croke agrees, in case of imminent Danger, all Men are bound, in their Persons and Estates, to defend the Kingdom; they must *exponere se & sua*.

As to the Power of laying this Charge, it is in the King, he holds his Diadem from God, and all others hold their Lands of him; and none can share with him in his absolute Power. The Parliament, I confess, is an excellent means of charging the Subject, but it is not the only Means. I shall ever remember with Respect, the Honour the last Parliament bestowed on me of being their Speaker; but I wish some had sow'd the Tares of Discontent in that Field of the Commonwealth, then we might have expected to have found good Fruit there; but now the best way to redeem that Miscarriage, is to give a ready Obedience to his Majesty's Commands.

Certainly

Certainly there was a King before a Parliament, or how should there be an Assembly of King, Lords and Commons? Arguently there was no Sovereignty in the Kingdom but this, his Power then was limited by no positive Law; It cannot be deny'd but the King had originally the Sovereignty of the whole Kingdom by Sea and Land, and had a Power of charging the whole Kingdom.

The Law commands nothing to be done but it permits the Ways and Means of effecting it; and as the Law gives the King the Power of defending the Kingdom, so it gives him a Power of charging the Subjects for that End; and as the King is bound to defend, so are the Subjects bound to obey, and provide Horses and Armour; and those who were heretofore compellable to find Bows and Arrows, must now find Gun, Powder and Shot, &c. And if the Sea and Land be one entire Kingdom, and the King be Lord of both, then is the Subject bound to the Defence of the Sea as well as of the Land; and then all are bound to provide Ships and other Necessaries for that Defence; and as to us that are Islanders, the Defence of the Sea is most necessary. In 88 it was resolv'd, that it was better to fight the Armada by Sea, than to suffer them to land.

There has not been cited one Authority, one Resolution, or even an Opinion, that in Time of Necessity and Danger, the King may not charge his Subjects for the Defence of the Kingdom. On the other hand, all the Authorities which shew the King is trusted with the Defence of the Kingdom, and, in many Cases, had Aids, Taxes and Subsidies given him, prove that the Subject, in case of Necessity and Danger, is bound to pay them to the King for the Defence of the Kingdom. And those Prerogatives of granting Tonnage and Mutage, and of digging for Saltpetre, &c. shew that for the good of the Publick, the King is interested in the Estates of his Subjects, and may charge them for their Well-being, and much more when the Being of the Commonwealth itself is at stake and in danger. And the Precedents the King's Council

If the King can command the Country to provide Land-Forces for the Defence of the Coasts, why not a Fleet of Ships for the same End?

And if the King can command the Country to provide Land-Forces for the Defence of the Coasts, why not a Fleet of Ships for the same End?

have produced to prove the Law in this Case are of good Authority. They shew several Precedents before the Conquest, in the Reigns of King Alfred, Edgar, and Ethelred, of Grants to the Church and Clergy, with Exceptions of these Charges; they shew Precedents of Writs granted to inland Counties, as Bucks, Huntingdon, Bedford, &c. and tho' they went not to all Counties at one time, but as Occasion requir'd; why might not the King, if he had pleas'd, have sent them to all as well as to some? The commanding sometimes one, and sometimes another, is an Argument they might be all commanded, if there was occasion, for this Guard of the Sea. The Abbot of Robertbridge's Case is of great Authority, notwithstanding what has been said against it; and besides those more antient Authorities that were cited, so lately as in Queen Elizabeth's Time Commissions were issued for the Defence of the Kingdom. The Letters from the Lords of the Council in 88 had the Queen's Writs in them; my Brother Croke owns we are compellable to serve with our Persons and Arms, but not to find Money; I answer, *bona Corporis* are above *bona Fortune*; there is more Reason their Estates than their Persons should be in his Power, in Case of Defence.

It is objected, that this Writ is against the common Law, because it is without Precedent. I answer, there are Precedents of the King's charging the Subject towards the Defence of the Kingdom, though not in this manner, by finding Ships.

It is objected also, that the Subject hath a Property in his Goods, that cannot be taken from him but by Consent; and many Charters and Statutes are cited to this purpose; but all that can be gathered from them is, that they should be free from all unjust Taxes; they cannot include Charges for the necessary Defence. In reciting the Conqueror's Laws, my Brother Croke left out that Clause, *Statuimus & firmiter precipimus ut omnes liberi homines totius Regni predicti sint fratres Conjurati ad Monarchiam nostram pro viribus suis & facultatibus contra inimicos pro posse suo defendenda; & viriliter servanda; &c.* which explains

Why should not the King command the Subjects Fortune as well as his Person, for the Defence of the Kingdom?

explains the former Words, and makes it apparent they were to defend the Kingdom *cum facultatibus*, as well as *viribus*; and that he did not design to discharge any Body from defending the Kingdom in Case of Necessity.

As for those Words in *Forrescue*, my Brother *Croke* so much insisted on, I take the Meaning to be, that the Kingdom ought to be govern'd according to the Laws of the Land, and that the King cannot alter the Laws without a Parliament; that the Subject hath an absolute Property in his Goods, and the King cannot take them to his own Use, and that he cannot for his own Use lay any Burden upon his Subjects without Consent of Parliament.

But all private Property must give way to the Publick; tho' a Man has a Property in his own Goods, he may not use them to the Detriment of the Commonwealth. A Man may give away his Corn or Grass, but if he burn or destroy them, or throw his Goods into the Sea, that they may perish, these are Crimes punishable at Common Law, as is the transporting of Goods to the Damage of the Publick; and if private Property must give way to the Publick in these Cases, much more in Cases of great Danger and Necessity, and it rather establishes Property, the asserting that only in Cases of Necessity it may be dispens'd with.

And to remove a Scandal from the King, as if he intended to turn this to his private Profit, my Lord Chief Justice *Bramston*, as well as my self, can testify that his Majesty declar'd he never intended to make any such Use of it, but thought himself bound in Conscience to convert it to the Use it was receiv'd for.

And whereas it is said, tho' they do not fear his Majesty's Charging them but upon urgent Necessity, yet they know not what succeeding Princes may do: I answer, if they should hereafter charge unreasonably, this Judgment warrants no such thing; and it is no Argument to condemn the true Use of a thing, because it may be abus'd. Besides, the Law reposes as great a Trust in the King as this. The King may pardon all Offences; but if he

The Publick have an Interest in every Man's Goods, and may restrain him from destroying them, notwithstanding his Property in them.

The King declares he will apply the Ship-money to the Use it was levy'd,

The King is intrusted with as great a Power in other Cases

should, who could be safe? he may make Peace or War, by either of which he might undo us; but it is not to be presum'd the King will do any thing against the Law, and the publick Good of the Kingdom; therefore the Law says, *the King can do no Wrong*, and that he is *Sponsus Regni*, as in *Magdalen College Case*.

As to that Case of *Durham*, distressed by the Scots, where the Defendant took 60 l. of the Plaintiff's in Pursuance of an Agreement of the Commonalty, and the Judgment against the Defendant was revers'd, because the Ordinance was by the Plaintiff's Consent: It does not follow from thence, but that all Men are bound to contribute to a general Charge for necessary Defence, tho' they do not consent.

As to that Declaration in the 2d of Ri. II. the King was then young, and the Parliament had the Regency, and it is only a Declaration of the Lords, that they could not charge the Commons: And besides, this was in the Case of a foreign War.

Whether it may not be deemed a time of War, tho' the Courts at *Westminster* are sitting.

It is acknowledged, that in a time of War, when the Courts of Justice are shut up, the King may charge; but there may be a time of War in some Parts of the Kingdom, when the Courts at *Westminster* are sitting; and whether the Danger be to all the Kingdom or Part, all ought to be charged; and the King may charge the Subject, as well for the Defence of the Sea as Land, they both make but one Kingdom. And I hold, a Danger in Expectancy a sufficient Ground for the King to charge the Subject. In 88 the Enemy had been upon us, if the Danger had not been foreseen and provided for.

If no Supplies can be had but in Parliament, then the Parliament, and not the King, are Judges of the Necessity.

Held that an Act to bar the Succession would be void.

And if the Subject could be charg'd no other way but in Parliament, then you make the Parliament, and not the King, Judge of the Necessity of a Defence. Or else you give the King the Charge of the Defence, without Power or Means to perform it. Acts of Parliament may take away the Flowers or Ornaments of the Crown, but not the Crown itself. An Act to bar the Succession would be void; they cannot enact, That no Lands shall hold of the Crown, or take away the Subjects Allegiance, or the King's Power of defending his People. And

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were there an Act, that he should not command his Subjects Persons or Money, in order to defend them, it were void. And this is not properly an Aid impos'd, but a Contribution of King and People; the King is tax'd as well as they.

As to the Objection, That the Command to the Sheriff to assess the Money is illegal; and that it ought to have been *per Sacramentum*, by the Oaths of a Jury, as in Writs of Partition, &c.

I answer, that the Assessment of a Subsidy is not *per Sacramentum*, much less ought it to be so here, it being a Matter of great haste; and further, such Assessments have always been made by the Sheriff, or some the King was pleas'd to trust, and there could be no fitter Person; besides, the Command was to provide a Ship; and if that had been done, there would have been no Necessity of an Assessment. Mr. Hambden has the least Cause of any Man in England to complain of the Inequality of it; but if it were otherwise, the Sheriff is answerable for it if he does any Wrong, as appears by Sir Walter Norton's Case, now depending in the Star-Chamber, concerning an Abuse in levying this Charge: And his Majesty has been so very careful in preventing and regulating Abuses herein, that he has sate daily in the Council Chamber to advise in it, and Commands have been given to the Judges to rectify Abuses of this kind in their Circuits.

Abuses in levying Ship-money.

As to that Objection, that the Sheriff taxes himself in this Case; I answer, The Justices of Peace in levying Subsidies make Rates for themselves, and Commissioners of Sewers tax their own Lands: And the Writs for levying Assessments for the Expences of the Knights of the Shire are directed to the Sheriff, who assesses himself: And if a Fine be laid upon the County, he levies it, and yet is chargeable towards it.

Instances where the Sheriff shall tax himself.

As to the Impossibility of providing a Ship by an inland County, I see nothing in that Objection, they may have a Ship and Mariners for their Money: We in Kent have several inland Towns, whose Business is Husbandry, and yet we are justly charg'd to find a Ship; till Alfred's time there was no Distinction

The Kingdom divided into Counties in King Alfred's Reign.

tion of maritime and inland Counties, then all England was but one maritime County.

And as to twenty-six Weeks Pay being commanded, tho' there are Precedents that the King has, *de facto*, paid Wages on the Soldiers marching out of their Counties; there are Precedents also where the Counties have been compell'd to maintain their Soldiers out of their Counties: Where the Soldiers have receiv'd the King's Wages, it has been generally for foreign Wars, not in Cases of Necessity, when they march'd for the Defence of the Kingdom: It was resolv'd in the Exchequer that the Sea and Land made but one Kingdom, and so there is no going out of the Kingdom here.

The Sea and
Land but one
Kingdom.

As to the last Objection, that it is against *Magna Charta*, for that *nullus liber homo imprisonetur*, &c. what was spoken concerning Noblemen, I conceive was to insinuate that they were more concern'd in this Matter than the rest of his Majesty's Subjects: And I answer, That here is no Imprisonment in Question, but the Assessment only. Why the Defendant should not pay the Money assess'd, or shew Cause to the contrary?

As to the *Certiorari* being directed to two Parties, the late and present Sheriff, nothing is more frequent, nor is the first Writ determin'd, (which was irreturnable) because the Time limited for preparing the Ship was expir'd, and so it needs no reviving.

And whereas 'tis said, it does not appear any Ship was prepar'd: I answer, It was prepar'd; but if it had not, the Fault was in them who did not pay their Money.

As to that Objection, that the King is not entitled to bring a *Scire facias*: I answer, He is interested in all Actions for the publick Good, and shall recover accordingly; as in the Cases of Pontage and Murage, &c. much more when it is for the Defence of the Realm: It was not fit indeed it should be express'd to be for the King, because it was for the publick Good only: And notwithstanding what my Brother *Denham* says, it is no unusual thing to certify the Tenor of a Record.

As to my Lord Chief Baron's Objection, that Judgment in this Case would be fruitless, and none could take any Benefit thereby: I answer him with a Judgment of his own in the Case of Knighthood, where the Case was the very same.

I am of Opinion that the Proceedings in this Case are according to Law, and that Mr. Hamdden ought to be charg'd with the 20 s. assess'd.

Lord Chief Justice Finch for the King.

The Argument of Sir John Bramston, Knt. Lord Chief Justice of the Court of King's Bench, in the Case of Ship-money.

I conceive whenever the whole Kingdom is in Danger, his Majesty may command all his Subjects to join with him in the Defence of it.

Lord Chief Justice Bramston's Argument.

As to the several Acts of Parliament that concern this Case, I take them to be merely declaratory of the Common Law: It is objected that by the 1 Ed. 3. cap. 5. none shall be compell'd to go out of their Counties, except in Case of Invasion, and Necessity requireth, and then it shall be done as in Times past.

Now what the Use was in Times past will be a very great Question in this Case; Mr. Hamdden's Council and my Brother Croke insist, that when the Subject goes out of the County, it ought to be at the King's Charge: But as my Brother Beukley has observ'd, the Precedents they produce either relate to a foreign War, or where it was for the ordinary Defence; as where Boroughs, or private Towns were pillaged by Pirates; and there is no Doubt but the King hath paid the Charge in these Cases.

But the Question remains, What the Subject may be compell'd to, in Case of Necessity, for the Defence of the Kingdom? And I am of Opinion they may be compell'd to this Charge *sumptibus propriis*; in Times of sudden Danger Wages are not to be insisted on.

It appears from Fitz. Nat. Br. 28. and in Calvin's Case, that the King may command his Subjects upon their Allegiance to go with him, or in his Service, to the Wars, as well without the Realm as within;

tion of maritime and inland Counties, then all England was but one maritime County.

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with in; and the 18 & 11 *Ed. 3.* are but in Affirmance of the common Law: And the 7 *Hen. 4.* it is said that none shall attend the King in his Wars out of the Realm without Wages, but in the Realm they are at his Command, and no Wages to be given; and that the Subject ought to be charg'd in time of a common Danger, appears by a Multitude of Precedents, which explain the Statutes of *Ed. 3.*

Among the rest, the Abbot of *Robertsbridge's* Case is conclusive, and the 10 *Ed. 3. M. 2. fol. 18.* the King commanded by his Writ an hundred Men to be sent to *Portsmouth*, and they refused to march without Wages: The King answer'd, *No Wages were due, for it was a publick Danger.*

As to that Objection of my Brother *Coke's*, that there is not one Precedent of the Subjects serving at his own Charge out of the Realm: I answer, That the Sea and Land are but one Kingdom; and he who is commanded into the Sea Service, does not serve out of the Kingdom: And if the Subjects may be compell'd to go out of their proper Counties, to defend the neighbouring Counties, why may they not also be compell'd to defend the Sea Coasts? And if formerly the Seamen were contented to defend the Coasts, in Consideration that the inland Counties took upon them the Charge of the Land Service, I know no Reason why they may not be oblig'd to bear the publick Charge together, in Cases of Necessity: *Mr. Selden*, in his *Mare Clausum*, says, It was the ancient Usage to charge both the inland and maritime Counties on any great Emergency.

Mr. Holborne puts a pretty Case concerning the Office of Alnage, where a Fee being to be paid out of it, it was held a Talliage; but there is great Difference between Talliage, and this Service, which every Subject is bound to by his Allegiance, to his sovereign Lord; *Fitz. Nat. Br. 103.* The King may impose this Charge in Case of Necessity, *pro bono publico*, and it is a Duty which every Subject owes to the Commonwealth in time of common Danger. My Lord *Coke* says, it could never be the Meaning of the great Charter to take away the King's Prerogative, and exempt the Subject from this Charge of Defence.

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As to what is objected, that a Parliament might have been call'd in this time; My Lord Finch answer'd very well, That a Preparation must be made against a Danger, else the Defence may come too late: And who is to give Warning of the Danger but the King? not the Tenant by Castle-guard was to give Notice of the Danger, but the Lord; and so in this Case the King is Judge of the Danger, and the Subject is bound by his Allegiance to assist in Case of publick Danger.

I admit, that tho' the King be the sole Judge of the Danger, and his Certificate is not traversable, yet the Danger must be express'd in the Record, that the Court may judge of it. And it has been observ'd by my Brothers, that there is enough to satisfy them that it was a publick Danger, *It being express'd to be pro defensione Regni, & tuitione Maris, &c.* Had it been only a Danger from Pirates, an ordinary Danger, then indeed it ought to be at the King's Charge.

The Danger ought to be express'd in the Writ.

As for the Power of Assessment given the Sheriff, I do not find he has the like Power in any other Case; but I answer, This is a Case of Necessity, and may require more haste than the usual Way, *per sacramentum*, will admit; but further, he is not to do it at his own Discretion, but *secundum Legem*; and I believe Mr. Hamden will not say he has been rated beyond his Proportion.

As to that Exception, that Judgment could not be given, because the *Mittimus* contain'd only the Tenor of the Record; and the Case of *Bodmin* was cited to support that Opinion: The Reason why he should not have Execution *super tenorem Record* there was, because the Subject might have been charg'd double, which he could not be in this Case. There is another Exception, that neither in the first or second Writ the Money is made due to the King, and therefore no Judgment can be given, *quod satisfaceret Domino Regi*; and if Judgment shall not be given for the King, then for whom *non constat*,

The Chief Justice allows that Exception, viz. That it does not appear to whom the Money is to be paid.

This is the only Exception that sticks with me ; for I know no Precedent where Judgment has been given; and not said to whom : I do incline therefore to believe this is a good Exception, tho' I am not perfectly satisfied that it is Law; but in all other Points I agree with the general Vote of the Court.

12 June, 14 Car. On the Motion of Mr. Attorney-General, Judgment was given in the Court of Exchequer against Mr. Hambden, viz.

Judgment given against Mr. Hambden.

Quod sepeal' Brevia prelati & Rotorum eorumdem ac schedul' prelati eisdem annex' ac materia in eisdem contenta sufficiunt in lege existunt ad prefat' Johannem Hambden de predicta Regine' Solid' super ipsum in forma Et ex causa predicta affessor' onerandi Idio Consideratum est per eosd' Barones, Quod predict' Johannes Hambden de eisdem Virginis Solid' oneretur Et exinde satisfaciatur, &c.

As for the Power of Affessment given the Sheriff, I do not find he has the like Power in any other Case; but I answer, This is a Case of Necessity, and may require more haste than the usual Way, for satisfaction, will admit; but further, he is not to do it at his own Pleasure, but by what is given; and I believe Mr. Hambden will not say he has been tried beyond his Proposition.

FINIS.

As to that Exception, that Judgment could not be given, because the Writum contain'd only the Tenor of the Record; and the Case of Bodinus was cited to support that Opinion: The Reason why he should not have Executed, after the Record, there was because the Writum was not then changed double, which was the first or the second Writ the King gave, and therefore not to be given, quod Jam factum Dominus Rex. The Writum shall not be given for the King, tho' it be to whom now consist.

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